92-1424

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CALIFORNIA FORESTRY ASSOCIATION,
Petitioner,

v.

SALMON RIVER CONCERNED CITIZENS, CALIFORNIA COALITION FOR ALTERNATIVES TO PESTICIDES, INC., SAFE ALTERNATIVES FOR OUR FOREST ENVIRONMENT, INC., NORTHCOAST ENVIRONMENTAL CENTER, INC.,

DALE ROBERTSON, CHIEF, UNITED STATES FOREST SERVICE, UNITED STATES DEPARTMENT OF AGRICULTURE,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether an intervenor-applicant's economic interests alone can satisfy the interest requirement for intervention of right under Fed.R.Civ.P. 24(a)(2) in an action to compel agency compliance with the National Environmental Policy Act.

Whether a timber trade association which has asserted undisputed noneconomic interests in the subject matter of an action to compel agency compliance with the National Environmental Policy Act, including its long-standing environmental interests and interests as an intended beneficiary of forestry statutes underlying the subject action, satisfies the interest requirement under Fed.R.Civ.P. 24(a)(2).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, California Forestry Association, prays for a writ of certiorari to review the opinion and order of the United States Court of Appeals for the Ninth Circuit entered in this case.

OPINION BELOW

The unpublished order and memorandum of the Court of Appeals for the Ninth Circuit from which petitioner is seeking relief is set forth at Appendix A. The unpublished order of the United States District Court for the Eastern District of California which denied petitioner in-

tervenor status is set forth at Appendix B. As to other opinions in this case, the opinion on the merits of the underlying case by the United States District Court for the Eastern District of California is reported at 798 F. Supp. 1434 and is set forth at Appendix C. The District Court's judgment in that case is set forth at Appendix D. That opinion has been appealed to the Ninth Circuit, which, as of the date of printing, has not issued its opinion.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 30, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

The pertinent rule involved is Rule 24(a)(2) of the Federal Rules of Civil Procedure, which is set forth below.

Rule 24. Intervention

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

STATEMENT OF THE CASE

This petition for review of the denial of intervention to petitioner California Forestry Association ("CFA") arises out of a long-standing dispute among the parties over whether the United States Forest Service of the United States Department of Agriculture ("Forest Service") may use herbicides selectively to control competing

vegetation and promote timber growth in Region 5 of the National Forest System.[1]

CFA represents approximately 82 forest products businesses and affiliated member companies, many of which are dependent upon timber from the national forests of California (*i.e.*, Region 5 of the United States Forest Service) and/or own private timber land adjacent to or within the boundaries of these national forests. CFA, its members and their employees also live near and adjacent to the national forests and regularly use the forests for recreation and enjoyment.

Respondents Salmon River Concerned Citizens, California Coalition For Alternatives to Pesticides, Inc., Safe Alternatives For Our Forest Environment, Inc. and Northcoast Environmental Center (hereinafter collectively referred to as "Salmon River") consist of members who use the Region 5 national forests to hike, gather wild foods, cross-country ski, observe wildlife, and seek solitude.

On February 27, 1989, the Forest Service issued a Record of Decision ("ROD") approving its Vegetation Management for Reforestation policy ("VMR") and accompanying Final Environmental Impact Statement ("FEIS") for all Region 5 national forests. Appendix C at 12a. The predecessor environmental impact statement ("EIS") to the FEIS for vegetation management was initially prepared in 1973. The EIS was updated in 1981; a draft EIS was issued in 1983 and public comment was solicited. In 1984, in light of certain court decisions outside of Region 5 that pertained to the requirements for an EIS,[2] the Forest Service determined that further study

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[1] Region 5, or the Pacific Southwest Region, includes all national forest land in California, in five counties of western Nevada, and in one county in southern Oregon. Appendix C at 11a.

[2] *Save Our Ecosystems v. Clark*, 747 F.2d 1240 (9th Cir. 1984); *Southern Oregon Citizens Against Toxic Sprays v. Clark*, 720 F.2d

on the issue of using herbicides was necessary. Subsequently, a supplement to the draft EIS incorporating this further study was issued in 1986. After responding to public comments on this draft, the FEIS was published in December of 1988. *Id.* at 11a. As indicated above, the ROD was issued somewhat later on February 27, 1989.

On May 26, 1989, Salmon River filed an administrative appeal of the ROD and FEIS with the Forest Service. CFA also appealed the ROD and FEIS within the Forest Service and intervened in Salmon River's administrative appeal. On January 7, 1991, the Forest Service denied all appeals and affirmed its decision to approve the VMR, ROD and FEIS. The Forest Service and CFA maintain that the ROD and FEIS for the VMR fully comply with the requirements of the National Environmental Policy Act ("NEPA"), as amended, 42 U.S.C. §§ 4321-4370a (1989 & Supp. 1992).

On February 21, 1991, Salmon River filed a complaint for declaratory and injunctive relief in the United States District Court for the Eastern District of California alleging that the Forest Service's VMR and its ROD and FEIS fail to comply with NEPA. The District Court's jurisdiction over the action was based on the Administrative Procedure Act, 5 U.S.C. §§ 701-706, and 28 U.S.C. § 1331 (federal question). On April 19, 1991 the Forest Service filed its answer, and prior to any further proceedings in this action, on May 24, 1991, petitioner CFA filed a motion for leave to intervene. Salmon River opposed CFA's motion to intervene, but the Forest Service did not. In its motion, CFA argued that it had significant economic and noneconomic interests which justified it being granted intervenor status in the case.[3]

1475 (9th Cir. 1983); *Oregon Environmental Council v. Kunzman*, 714 F.2d 901 (9th Cir. 1983); *Citizens Against Toxic Sprays v. Bergland*, 428 F. Supp. 908 (D. Or. 1977).

[3] Courts have commonly held that to intervene as of right a party must show: (1) its motion was timely, (2) it has an interest relat-

Many of CFA's members purchase, harvest and process timber from the national forests in California and are dependent upon these forests as their sole or principal source of timber supply. Appendix F at 39a (¶ 2). *Thus*, CFA's members claim a direct economic and future contractual interest in the continuing supply of timber from the national forests as mandated by the National Forest Management Act of 1960 ("NFMA"), 16 U.S.C. § 1601 *et seq.* (1984 & Supp. 1992), the Multiple-Use Sustained-Yield Act, 16 U.S.C. §§ 528-531 (1978), and the Organic Act, 16 U.S.C. § 475 (1978). Appendix F at 39a, 43a (¶¶ 2, 12). If the injunctive relief sought by Salmon River in this action is ultimately granted, the volume of timber available for public harvest from the California national forests will significantly decline—a consequence which will severely impact CFA's members, its employees and their families. Appendix F at 42a-43a (¶¶ 10, 11). CFA has also alleged that if the selective use of herbicides is not allowed, more intensive vegetation management by mechanical and other means will ultimately be more injurious to human health. Appendix E at 33a.

Further, some of CFA's members own private timber land adjacent to, or located within, the boundaries of several California national forests. Their use of this land, and the use of herbicides on these lands, could be directly affected and unduly restricted if Salmon River's challenge is successful. Appendix F at 39a, 43a (¶¶ 2, 12). Also, it is uncontroverted that the significant decrease in timber supply which would result from the relief requested by Salmon River in this action would dramatically decrease the revenues available to the local communities

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ing to the property or transaction which is the subject of the action, (3) it is so situated that without intervention, the disposition of the action may as a practical matter impair or impede its ability to protect that interest, and (4) its interest is not adequately represented. In the instant case, neither the Disrict Court nor the Court of Appeals addressed any of the requirements for intervention other than whether CFA's interest was sufficient under (2) above.

in California in which CFA, its members and their employees reside, thus reducing their standards of living. The counties of California receive approximately 25% of the receipts derived from the sale of timber from the national forests for use in financing schools and roads. Appendix F at 43a (¶ 11).

By order filed July 22, 1991, the District Court denied CFA's motion. Appendix B. The District Court ruled that "[w]hatever the logic of CFA's argument", the disposition of CFA's motion for intervention was controlled by *Portland Audubon Society v. Hodel*, 866 F.2d 302 (9th Cir. 1989), *cert. denied*, 492 U.S. 911 (1989), in which the Ninth Circuit held that purely economic interests are insufficient to justify intervention under NEPA. Appendix B at 7a. Notwithstanding that CFA asserted numerous long-standing noneconomic interests, the District Court stated that "CFA represents companies which are 'dependent upon timber from the national forest of California' " and thus held that "CFA's asserted noneconomic interest are intertwined with its economic interests." [4]

CFA then appealed the District Court's order to the United States Court of Appeals for the Ninth Circuit. Salmon River opposed this appeal but the Forest Service did not. In affirming the District Court's order, the Court of Appeals concluded that " 'purely economic interests' are not sufficient for intervention in a NEPA action. . . ." Appendix at 3a. While the Court of Appeals ruled that "[t]he District Court's determination that CFA's noneconomic interests did not justify intervention was correct," the Court of Appeals did not directly address the District Court's determination that CFA's noneconomic interests were subsumed by CFA's economic interests. Appendix A at 4a.

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[4] The District Court also denied CFA's motion in the alternative for permissive intervention. Exhibit B at 9a. However, the District Court granted CFA permission to participate as an *amicus curiae*. *Id.*

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE NINTH CIRCUIT BELOW AND THE DECISION OF THE SEVENTH CIRCUIT UPON WHICH IT IMPLICITLY RELIES ARE IN DIRECT CONFLICT WITH THE DECISION OF THE TENTH CIRCUIT WHICH RECOGNIZES THAT ECONOMIC INTERESTS ALONE MAY SATISFY THE INTEREST REQUIREMENT FOR INTERVENTION OF RIGHT UNDER FED.R.CIV.P. 24(a)(2) IN AN ACTION TO ENFORCE AGENCY COMPLIANCE WITH THE NATIONAL ENVIRONMENTAL POLICY ACT. THIS CONFLICT AMONG THE CIRCUITS RESULTS IN INEQUITABLE AND INCONSISTENT APPLICATION OF RULE 24(a)(2).

This petition addresses a conflict among the United States Courts of Appeals concerning the availability of intervention of right under Fed.R.Civ.P. 24(a)(2) in actions brought to enforce federal agency compliance with NEPA. Increasingly, such actions are being filed by public interest groups in federal district courts. Typically in such cases a preliminary and permanent injunction are sought to stay a major federal related program or project, such as a dam, a federal timber sale or a power plant until the agency performs such additional environmental analysis as the plaintiff contends is required for full NEPA compliance. Just as typically, a business, farm, local community or other group with vital economic interests in the program or project at issue seeks to intervene to defend the agency's actions where, in the intervenor-applicant's view, the additional environmental analysis demanded by the plaintiffs is unnnecessary or potentially misleading and would materially delay or cause total cancellation of the program or project, thereby resulting in substantial economic losses to the intervenor-applicant. At least three courts of appeal are in conflict as to whether intervenor-applicants with such economic interests are entitled to intervention.

The decision of the Ninth Circuit below, a previous Ninth Circuit decision, *Portland Audubon Society v.*

Hodel, 866 F.2d 302 (9th Cir. 1989), *cert. denied*, 109 S.Ct. 3229 (1989), and the decision of the Seventh Circuit in *Wade v. Goldschmidt*, 673 F.2d 182 (7th Cir. 1982),[5] have held that economic interests alone, however substantial they may be, can never satisfy the interest requirement necessary to qualify for intervention of right under Rule 24(a)(2). Conversely, the United States Court of Appeals for the Tenth Circuit in *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission ("NRDC")*, 578 F.2d 1341 (10th Cir. 1978), has permitted intervention of right under Rule 24(a)(2) to business entities claiming only economic interests.[6] This conflict among the circuits has resulted and will continue to result in inequitable and inconsistent applications of Rule 24(a)(2) in actions to enforce agency compliance with NEPA.

In addition to a direct conflict with the Tenth Circuit, the Ninth Circuit decision below is also in direct conflict with another decision of the Ninth Circuit, *County of Fresno v. Andrus*, 622 F.2d 436 (9th Cir. 1980), which, like the *NRDC* case, permitted intervention of right under Rule 24(a)(2) in a NEPA compliance case where the only interest advanced by the intervenor-

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[5] Other Seventh Circuit decisions have followed *Wade v. Goldschmidt*, 673 F.2d 182 (7th Cir. 1982), or cited it with approval in reaching similar results. *E.g., American National Bank & Trust Co. of Chicago v. City of Chicago*, 865 F.2d 144 (7th Cir. 1989); *Keith v. Daley*, 764 F.2d 1265 (7th Cir. 1985); *United States v. 36.96 Acres of Land*, 754 F.2d 855 (7th Cir. 1985).

[6] *See also Sanguine, Ltd. v. United States Department of the Interior*, 736 F.2d 1416, 1420 (10th Cir. 1984) (although not a NEPA compliance action, this decision found the interest requirement of Rule 24(a)(2) satisfied by the intervenor-applicants' "economic stake in the challenged ruling" and cited *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission*, 578 F.2d 1341 (10th Cir. 1978) with approval in noting: "We have held that applicants in situations similar to appellants possess a sufficient interest to intervene in suits challenging agency action").

applicants was economic. Thus there exists an unresolved conflict within the Ninth Circuit as well.[7]

Although the Supreme Court has twice briefly addressed the interest requirement under Rule 24(a)(2), the Court has provided very little guidance to date to the courts of appeals on how that interest is to be defined. Not surprisingly, both lines of cases described above have directly or indirectly claimed support for their interpretation of Rule 24(a)(2) from one of the Supreme Court precedents.

In *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 169 (1967), the Supreme Court initially addressed the newly amended version of Rule 24(a)(2) in the context of an antitrust divestiture. The state of California, Southern California Edison (a utility company) and Cascade Natural Gas (a distributor in Oregon and Washington) sought to intervene based upon their asserted interests in the competitive impact which divestiture would have upon them. The Court ruled that all three intervenor-applicants' interest in insuring competition which might affect them qualified under the interest requirement of Rule 24(a)(2). 386 U.S. 132-36.

Four years later in *Donaldson v. United States*, 400 U.S. 517 (1971), the Supreme Court addressed the requirments of Rule 24(a)(2) for the second time. In *Donaldson* a federal taxpayer filed motions to intervene in proceedings to enforce Internal Revenue Service summonses directed to an alleged former employer of the taxpayer and to the employer's accountant for production of the taxpayer's employment and compensation records per-

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[7] Both the decision below (Appendix A at 3a) and the *Portland Audubon* case, 866 F.2d at 309, purport to distinguish *County of Fresno v. Andrus*, 662 F.2d 436 (9th Cir. 1980). However, as discussed in further detail, *infra* at 12, the rulings in these cases are unreconcilable and cannot be distinguished because the only interests of the intervenor-applicants in *County of Fresno* were obviously economic.

taining to certain years which were under investigation. The Supreme Court upheld the lower court's denial of the taxpayer's motion to intervene on the ground that the taxpayer had failed to state a "significantly protectable interest". 400 U.S. at 532. The Court further noted that if the taxpayer really had such a "protectable interest", "as, for example, by way of privilege or to the extent, he may claim abuse of process, [he] may always assert that interest or that claim in due course at its proper place in any subsequent trial." *Id.* *Cascade Natural Gas* and *Donaldson* are, at best, only partial and mixed guidance as to what sort of interest qualifies under Rule 24(a)(2).

The Ninth Circuit in the *Portland Audubon* case and implicitly in the decision below, and the Seventh Circuit in *Wade* read *Donaldson* to require a highly narrow and technical concept of interest. Under these Ninth Circuit and Seventh Circuit cases the "property or transaction which is the subject of the action" in a NEPA compliance case is narrowly and abstractly limited to the issue of NEPA compliance. Such a myopic view misses the forest for the trees (literally in the instant case) because it ignores the statutes, regulations or policies which authorize the program or project which is the subject of the NEPA compliance.

Thus, in *Portland Audubon*, several plaintiff environmental groups opposed the logging of old growth timber on timber sales offered by the Bureau of Land Management. 866 F.2d 302, 303 (9th Cir. 1989). The plaintiffs sought declaratory and injunctive relief based upon alleged violations of NEPA and various other statutes. *Id.* The Northwest Forest Resources Council, a timber industry trade association, and several timber companies appearing individually were allowed to intervene as defendants with respect to certain of plaintiffs' claims related to the Oregon and California Lands Act, 43 U.S.C. § 1181 (1982), and the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-1783 (1982), but were de-

nied intervention with respect to plaintiffs' NEPA claims. 866 F.2d at 308. The *Portland Audubon* court observed, "no one denies that [the applicants] have an economic interest in insuring a continued supply of timber from BLM Lands," but the Court concluded that "NEPA provides no protection for the purely *economic interests* that [the applicants] assert." *Id.* at 308-09 (emphasis added).

The *Portland Audubon* court then continued to adopt much of the analysis in *Wade v. Goldschmidt* where the Seventh Circuit rejected the attempt of two corporations, four families and asserted city and county governments to intervene as defendants in an action in which the plaintiffs challenged a proposed bridge and expressway project as violative of several federal statutes, including NEPA. The Seventh Circuit concluded that since NEPA itself (according to the *Wade* court) addressed only the procedural requirements imposed on federal entities making administrative decisions, intervenor-applicants, even when threatened with substantial economic harm, do not possess an adequate interest for intervention. *Portland Audubon*, 386 F.2d at 309; *Wade*, 673 F.2d at 184-85. As discussed in detail in Part II below, this narrow interpretation neither meets the needs of judicial economy nor squares with the meaning and intent of NEPA or Rule 24(a)(2).

Ironically, without extensive analysis of the interest requirement, the Ninth Circuit permitted intervention in *County of Fresno, supra*, where the county and other plaintiffs sued the Secretary of the Interior to compel suspension of rule-making procedures governing excess land sales until an environmental impact statement concerning that agency action was prepared. The National Land for People, Inc. (NLP), a group of small farmers and would-be farmers who sought the opportunity to purchase federally irrigated excess land, moved to intervene asserting an "interest in the regulations being promulgated expeditiously". *Id.* at 437. In overturning the district court's denial of NLP's motion to intervene, the

Ninth Circuit analyzed NLP's interest not with regard to the NEPA claims, but with regard to the federal reclamation laws under which the regulations were being promulgated, even though the plaintiff's challenge was only to the compliance of the Secretary of the Interior with NEPA.

Portland Audubon acknowledged the validity of the ground for intervention identified in *County of Fresno* but found that the intervenors in *Portland Audubon* had not established that they were intended beneficiaries of the statutes at issue in that case. 866 F.2d at 309. Likewise, the decision below asserts that *County of Fresno* can be distinguished on the ground that the CFA is not an intended beneficiary of the statutes underlying the NEPA action. However, neither *Portland Audubon* nor the decision below have explained how intervention could be appropriate under *County of Fresno* since the interests of the intervenor-applicants in that case were clearly economic and not environmental. The decision below and *Portland Audubon* simply cannot be reconciled with *County of Fresno* with respect to the economic versus noneconomic interest issue.

The analysis adopted by the Tenth Circuit in *NRDC* is starkly different from that adopted by the Ninth Circuit in *Portland Audubon* and by the Seventh Circuit. In *NRDC* potential licensees for the operation of uranium mills and mines were granted intervention of right in an action brought by environmental groups under NEPA to prohibit the government from issuing licenses for operation of the mills and mines without first preparing environmental impact statements. The issue before the court was whether the intervenor-applicants satisfied the interest requirement under Rule 24(a)(2). The Tenth Circuit adopted the following analysis:

> Plaintiffs-Appellees maintain that the appellants do not have the requisite interests because they are not directly involved; that the controversy centers on

> efforts of the Natural Resources Defense Council, Inc. to prevent the issuance of a license to United Nuclear unless and until an environmental impact statement is issued. The question then is whether the contention made is a correct concept of interest. Strictly to require that the movant in intervention have a *direct* interest in the outcome of the lawsuit strikes us as being too narrow a construction of Rule 24(a)(2).
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> * * * *
>
> However, the consequence of the litigation could well be the imposition of the requirement that an environmental impact statement be prepared for granting any uranium mill license in New Mexico or, secondly, it could result in an injunction terminating the agreement between NRC and NMEIA [the state agency granting state licenses]. Either consequence would be felt by United Nuclear and to some degree, of course, by Kerr-McGee [the intervenor-applicant], which is said to be one of the largest holders of uranium properties in New Mexico. It operates a uranium mill in Grants, New Mexico pursuant to an NMEIA license, which application for renewal is pending. A decision in favor of the plaintiffs, which is not unlikely, could have a profound effect on Kerr-McGee. Hence, it does have an interest within the meaning of Rule 24(a)(2).

578 F.2d at 1344. The economic interest of CFA's members in operating their timber mills, which are dependent upon the supply of timber from the national forests of Region 5, is no less direct or significantly protectable an economic interest than the economic interest of the intervenor-applicant uranium mill owners in *NRDC*. *See also* regarding other federal environmental compliance issues, *Natural Resource Defense Council, Inc. v. Costle*, 561 F.2d 904, 909, n.27 (D.C. Cir. 1977) (rubber and chemical companies and trade associations who would "almost certainly be affected by regulations promulgated pursuant to a settlement agreement" granted intervention of right in case involving implementation of settle-

ment agreement which obligated Environmental Protection Agency to regulate toxic discharges into American waters); *Nader v. Ray*, 363 F. Supp. 946, 953 (D.D.C. 1973) (public utilities designer and manufacturer of nuclear power reactors who alleged impairment of economic interests granted intervention of right in action brought against federal agency alleging violation of Atomic Energy Act).

The conflict between *Portland Audubon*, *Wade*, and the decision below on the one hand, and *County of Fresno* and the Tenth Circuit's decision in *NRDC* on the other has resulted in a grossly inconsistent and inequitable application of Rule 24(a)(2). Review by this Court of the decision below and *Portland Audubon* and *Wade* in light of this conflict is necessary to insure uniformity and fairness in the future application of Rule 24(a)(2).

II. THE HOLDING OF THE COURT BELOW THAT ECONOMIC INTERESTS ALONE CANNOT SATISFY THE INTEREST REQUIREMENT UNDER FED.R.CIV.P. 24(a)(2) MISCONSTRUES THE MEANING AND INTENT OF RULE 24(a)(2) AND THE NATIONAL ENVIRONMENTAL POLICY ACT.

The Court of Appeals below stated that in order to justify intervention of right, the interests of the intervenor-applicant must be those "intended to be protected by the statute at issue- in this case, NEPA." Appendix A at 3a (*quoting Portland Audubon*, 866 F.2d at 309). However, the Ninth Circuit's view that NEPA was enacted solely to protect environmental interests and does not encompass economic interests is incorrect and inconsistent with the plain language of the statute. In fact, NEPA was enacted to insure the *balancing* of many interests in the planning of federal programs and projects, including both environmental and economic interests.

More specifically, NEPA charges the federal government with carrying out policies that "achieve a balance between population and resource use which will permit

high standards of living and a wide sharing of life's amenities" as well as "fulfill the social, economic, and other requirements of present and future generations of Americans." 42 U.S.C. § 4331(a), (b)(5) (1989). This balancing is to be achieved through "maintenance and enhancement of long-term productivity" of the environment. 42 U.S.C. § 4332(C)(iv) (1989). Therefore, it is apparent that NEPA was enacted to protect the *overall* quality of life, encompassing both environmental and economic interests.

Even though concern for the environment was obviously a primary motivation when Congress enacted NEPA, Congress did not intend for NEPA analyses to be restricted to environmental concerns alone, but rather that all governmental agencies are to "insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations . . . ." 42 U.S.C. § 4332(B) (1989). Consistent with this direction, governmental actions taken pursuant to NEPA, such as the preparation of an environmental impact statement, are expected to and do address economic considerations and are not limited to purely environmental considerations.

The language of NEPA itself demonstrates that the Ninth and Seventh Circuits' determinations that economic interests are not within the ambit of interests protected by NEPA must be incorrect. Because NEPA charges the federal government with carrying out policies that "achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities" as well as "fulfill the social, economic, and other requirements of present and future generations of Americans" (42 U.S.C. § 4331(a), (b)(5) (1989)), it is clear that NEPA protects economic as well as social interests in the environment. NEPA promotes and protects the balancing of many interests, not purely environmental interests.

The language and apparent intent of Rule 24(a)(2) is also contrary to the Court of Appeals' holding that CFA is not entitled to intervene as of right because its interests are "purely economic." Rule 24(a)(2) states in pertinent part:

> [A]nyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed.R.Civ.P. 24(a)(2). Plainly, the language of Rule 24(a)(2) does not require a restrictive view of the nature of the interest required in the subject of the action. To the contrary, the "property" or "transaction" that is the subject of the action in this case cannot reasonably be limited to an abstract concept of NEPA compliance divorced from the actual utilization of forest resources—both economic and noneconomic—which is at issue. Since CFA, its members and their employees depend upon this "property" (*i.e.*, the forests) for their livelihoods and for recreation and enjoyment, they have economic as well as noneconomic interests in the outcome of this action.

Moreover, even the Ninth Circuit has recognized that whatever the Supreme Court means by a "significantly protectable interest", the interest asserted need not be a present "legal or equitable interest," *Blake v. Pallan*, 554 F.2d 947, 952-54 (9th Cir. 1977). The consideration is whether an applicant's interest may be impaired by the outcome of the lawsuit; if so, intervention should be granted. *Smith v. Pangilinan*, 651 F.2d 1320, 1324 (9th Cir. 1981).

Further, soon after Rule 24(a)(2) was amended in 1966, the D.C. Circuit recognized that "we know from the recent amendments to the Civil Rules that in the in-

tervention area the 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967) (cited with approval by the Ninth Circuit in *Portland Audubon*, 866 F.2d at 308, and in *County of Fresno*, 622 F.2d at 438). Intervenor-applicants like CFA with demonstrable, substantial economic interests will either have those interests foreclosed by the doctrine of *stare decisis* or will be compelled to bring an action of their own at a later date to defend their economic interests if intervention is not permitted. Surely fairness and judicial economy argue very strongly that interests of the type alleged by CFA should be resolved insofar as possible in a single proceeding "involving as many apparently concerned persons as is compatible with efficiency and due process". 385 F.2d at 700.

Both the language and intent of NEPA and Rule 24 (a)(2) have been unduly restricted, if not distorted, by the decisions of the Ninth and Seventh Circuits. After nearly a quarter century of experimentation in the courts of appeals, the time has come for the Supreme Court to address this issue. Regardless of the outcome, uniformity in the interpretation of Rule 24(a)(2) will promote judicial economy by clarifying and simplifying the intervention application process and reducing the continuing litigation over this issue.

III. THE HOLDING OF THE COURT BELOW THAT THE INTERVENOR-APPLICANT'S UNDISPUTED ALLEGATIONS OF NONECONOMIC ENVIRONMENTAL INTERESTS AND INTERESTS UNDER THE FORESTRY STATUTES UNDERLYING THE SUBJECT ACTION CANNOT SATISFY THE INTEREST REQUIREMENT OF FED.R.CIV.P. 24(a)(2) IS ERRONEOUS, IN DIRECT CONFLICT WITH ANOTHER NINTH CIRCUIT DECISION AND, IF ALLOWED TO STAND, WILL LEAD TO INEQUITABLE AND INCONSISTENT APPLICATION OF RULE 24(a)(2).

Assuming, *arguendo*, that only noneconomic interests can satisfy the interest requirement for intervention of right in a NEPA compliance action, the record in this case amply demonstrates that CFA has stated multiple substantial uncontroverted noneconomic interests. The summary determination of the Ninth Circuit that these interests are not significant and do not create an interest satisfying intervention (Appendix E at 31a; Appendix A at 4a) blatantly ignores the fact that CFA has asserted many interests in support of its request for intervention that are virtually identical in quality to the interests the Salmon River plaintiffs have asserted to establish standing. For example, plaintiffs allege that their use of and recreation in the national forests of Region 5 will be detrimentally affected if the herbicides which they claim are injurious to human health are used to promote reforestation. Among its interests CFA has alleged that its member companies and their owners and employees likewise use the national forests of Region 5 for enjoyment and recreation as well as depend on those forests for their livelihood. CFA alleges that without the selective and careful use of herbicides proposed by the Forest Service, reforestation efforts will be inadequate and the use and enjoyment of the national forests by CFA, its members and their employees will be detrimentally affected.

In addition, CFA alleges that for more than a decade it has been actively involved in the NEPA and forestry

planning process which has led up to the VMR policy which is at the heart of this action. Other noneconomic interests in the subject of this action asserted by CFA include its long-standing efforts to promote the regeneration of national forests devastated by forest fires and its commitment to keep its members informed of the proper interpretation of NEPA as it relates to national forest planning laws. Appendix E at 31a; Appendix F at 41a. CFA has alleged safety concerns on behalf of its members and their employees and their families. CFA has alleged that if a total ban on the use of herbicides is imposed, as Salmon River advocates, the resulting overemphasis on mechanical and other means of vegetation management will be substantially more injurious to human health and less environmentally desirable than the balanced approach of incorporating herbicides selectively with other methods of vegetation management which has been adopted by the Forest Service. Appendix F at 43a.

In denying CFA's request for intervention of right, the District Court below summarily dismissed all of CFA's noneconomic interests on the ground that these interests were subsumed by CFA's economic interests and therefore, "Whatever the logic of CFA's arguments, the [district] court is controlled by the Ninth Circuit's opinion in *Portland Audubon* holding that interests such as CFA's do not justify intervention of right in actions under NEPA". Appendix B at 7a. Thus, the District Court concluded that "CFA's interests are within the ambit of the economic interests precluded by the Ninth Circuit, even when recharacterized as interests in noneconomic values supported by the responsible management of privately-owned timber companies." *Id.* While the Ninth Circuit decision below does not explicitly adopt the District Court's rationale that CFA's noneconomic interests are subsumed in its economic interests, the Ninth Circuit's summary dismissal of CFA's noneconomic interests has virtually the same effect and since the plaintiffs

have been accorded standing based on parallel allegations relating to their use and enjoyment of the forests, it would appear that a double standard is being applied.

In evaluating standing for plaintiffs to initiate actions to compel agency compliance with NEPA (a different but related doctrine to intervention),[8] the courts have consistently recognized that strong economic motivation or interests do not disqualify business entities from challenging NEPA compliance where noneconomic interests exist to support such challenges. For example, in *National Helium Corp. v. Morton*, 455 F.2d 650, 655 (10th Cir. 1970), the court observed that "no group has a monopoly on working for the public good." In upholding the standing of several oil and gas companies to challenge the Secretary of the Interior's alleged failure to comply with NEPA when he terminated a contract to purchase helium, the Tenth Circuit agreed with the district court that "it was 'passing strange' to see the giants of the oil and gas industry representing the public interest"; nonetheless, the court of appeals concluded that these companies were not *per se* disqualified from representing that interest. The court reasoned:

> We are unable to say that the companies are motivated solely by protection of their own pecuniary interests and that the public interest aspect is so infinitesimal that it ought to be disregarded altogether. It is not part of our function to weigh or proportion these conflicting interests. Nor are we

[8] In *Diamond v. Charles*, 476 U.S. 54, 69-70, (1986), the Supreme Court declined to decide whether a party seeking to intervene must satisfy not only the requirement of Rule 24(a)(2), but also the requirements of standing under Article III of the Constitution. Also, without significant discussion, in *Diamond* the Court reaffirmed its recognition that certain public concerns may very well constitute an adequate "interest" in the meaning of Rule 24(a)(2) (as stated in *Cascade Natural Gas, supra*), and that the requisite interest under Rule 24(a)(2) must be a "significantly protectable interest" (citing *Donaldson, supra*).

> called upon to determine whether persons seeking to advance the public interest are indeed conscientious and sincere in their efforts. True, the plaintiffs are not primarily devoted to ecological improvement, but they are not on this account disqualified from seeking to advance such an interest.

Id. at 655; *see also Robinson v. Kuebel*, 550 F.2d 422, 425 (8th Cir. 1977) ("individuals motivated in part by protection of their own pecuniary interest can challenge administrative action under NEPA provided that their environmental concerns are not so insignificant that they ought to be disregarded altogether"); *County of Josephine v. Watt*, 539 F. Supp. 696, 704 (N.D. Cal. 1982) (court granted standing to timber company plaintiffs to challenge the adequacy of an EIS: "lumber plaintiffs are causally affected by a matter of NEPA concern and seek to protect not only their individual financial interests, but also the quality of life and public interests of their geographic regions").

In addition, the decision of the Ninth Circuit below dismissing CFA's claimed interests based upon CFA's years of involvement in the forest planning/NEPA process leading to the VMR policy, including filing its own administrative appeal of that policy and intervening in Salmon River's administrative appeal, is wholly unwarranted. The Ninth Circuit summarily dismissed this interest with the comment, "Also, if CFA's prior involvement were sufficient, intervention would be too readily available." Appendix A at 4a. However, exhaustion of these administrative remedies through years of involvement at several administrative levels is, to say the least, arduous, and recognizing CFA's interest based on this substantial commitment would hardly make intervention "too readily available."

Finally, the Ninth Circuit decision below has not and cannot reasonably distinguish CFA's claim that it is an intended beneficiary of the underlying forestry statutes

in this action from the similar claim of the successful intervenor-applicants in *County of Fresno*, *supra*, who claimed an interest in the underlying statute and regulation whose implementation was being delayed by the NEPA compliance.

The VMR policy is being promulgated by the Forest Service as a part of its forest management responsibilities under NFMA, 16 U.S.C. 1601 *et seq.* (1984 & Supp. 1992), the Multiple-Use Sustained Yield Act of 1960, 16 U.S.C. §§ 528-531 (1978), and the Forest Service's Organic Act, 16 U.S.C. § 475 (1978). Under NFMA, the Forest Service is required to prepare land and resource management plans for each of the national forests. These plans must provide for the "multiple use and sustained yield of the products and services obtained" from the national forest in accordance with the Multiple-Use Sustained-Yield Act of 1960. Under the Multiple-Use Sustained-Yield Act of 1960, the Secretary of Agriculture is required to administer the renewable surface resources of the national forests in a manner "as best to meet the needs of the American people" and in a manner that provides for "the achievement and maintenance in perpetuity of a high-level annual or regular output of the various renewable resources of the national forests. . . ." 16 U.S.C. § 531 (1978). Among other purposes, the national forests must specifically be managed in part for the production of timber. 16 U.S.C. § 528 (1978). The Forest Service's Organic Act directs that national forests be established to furnish a continuous supply of timber. 16 U.S.C. § 475 (1978). These management obligations of the Forest Service are specifically cited in the FEIS as the basis for the development of VMR policy. (Also, each of the national forest plans which have been or are being prepared in Region 5 are based upon and incorporate the VMR policy which is the subject matter of this action and the target of Salmon River's NEPA challenge.)

It is undisputed that CFA's members and their employees are dependent upon timber from the national forest system for their livelihoods and that CFA's members and their employees and families regularly use the national forests of Region 5 for recreation and enjoyment. Appendix F at 39a. In light of the statutorily mandated forest management objectives referenced above and CFA's uncontroverted interests, CFA's interests are unquestionably among those which Congress sought to protect in enacting all three forest management statutes.

This type of interest is strikingly similar to the interest mantained by the intervenor-applicants in *County of Fresno*, *supra*. In *County of Fresno*, the defendant-intervenors asserted their interests in the orderly and prompt implementation of a federal policy and in expeditious promulgation of the federal regulations necessary for them to purchase federal land. 622 F.2d at 437. In this case, CFA desires the prompt implementation of a federal policy (*i.e.*, the VMR policy) and, like the defendant-intervenors in *County of Fresno*, vigorously opposes the plaintiffs' efforts to enjoin implementation of this policy based upon an alleged need for further environmental impact analysis. CFA alleges that the reforestation which they believe is vital to their economic and noneconomic interests will be detrimentally affected if all herbicide use continues to be banned. This case simply cannot be distinguished from *County of Fresno*. CFA is entitled to intervention of right on the same basis as were the defendant-intervenors in that case.

Even if it is assumed, *arguendo*, that only noneconomic interests satisfy the interest requirement under Rule 24 (a)(2) in a NEPA compliance action, fairness and consistency in the application of Rule 24(a)(2) require uniform direction from this Court as to how an intervenor-applicant's noneconomic interests are to be evaluated. In the absence of such direction, inconsistency

and inequity in the treatment of intervenor-applicants will continue and is likely to exacerbate.

CONCLUSION

For each of the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-16369

DC No. CV-91-00217-DFL

SALMON RIVER CONCERNED CITIZENS, CALIFORNIA COALITION FOR ALTERNATIVES TO PESTICIDES INC., SAFE ALTERNATIVES FOR OUR FOREST ENVIRONMENT, INC., NORTHCOAST ENVIRONMENTAL CENTER, INC.,
Plaintiffs-Appellees,

v.

DALE ROBERTSON, Chief Forester
UNITED STATES FOREST SERVICE,
UNITED STATES DEPARTMENT OF AGRICULTURE,
Defendant,

CALIFORNIA FORESTRY ASSOCIATION,
Intervenor-Appellant.

Appeal from the United States District Court
for the Eastern District of California
David F. Levi, District Judge, Presiding
Argued and Submitted November 3, 1992
San Francisco, California

Before: SNEED, ALARCON, and CANBY, Circuit Judges.

MEMORANDUM*

[Filed Nov. 30, 1992]

Appellant California Forestry Association challenges the district court's denial of intervention as of right in the underlying NEPA compliance suit concerning the sufficiency of the Environmental Impact Statement for Region 5 of the National Forest System. We affirm.

I.

FACTS AND PRIOR PROCEEDINGS

In the underlying suit, the appellees, Salmon River Concerned Citizens, are alleging that the Environmental Impact Statement (EIS) prepared by the Forest Service, in connection with its Vegetation Management for Reforestation (VMR) policy for Region 5 of the National Forest System, does not meet the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq. Appellees are seeking an injunction banning the use of herbicides until an EIS that meets the requirements of NEPA has been produced. Appellant California Forestry Association (CFA), a California nonprofit mutual benefit corporation which represents approximately eighty-two forest products businesses and affiliated companies, was denied intervention as of right in the action under Federal Rule of Civil Procedure Rule 24. While the district court denied intervention, it permitted CFA to file amicus briefs.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

II.

JURISDICTION AND STANDARD OF REVIEW

This court has jurisdiction to review the denial of intervention as a final order under 28 U.S.C. § 1291. A district court's denial of intervention as of right is reviewed de novo. *Scotts Valley Band of Pomo Indians v. United States*, 921 F.2d 924, 926 (9th Cir. 1991).

III.

DISCUSSION

The appellant is challenging the district court's denial of its motion to intervene as of right. To intervene as of right a party must show: (1) its motion was timely; (2) it has an interest relating to the property or transaction which is the subject of the action; (3) it is so situated that without intervention, the disposition of the action may as a practical matter impair or impede its ability to protect that interest, and (4) its interest is not adequately represented. *Portland Audubon Soc'y v. Hodel*, 866 F.2d 302, 308 (9th Cir.), *cert. denied*, 492 U.S. 911 (1989). The burden to prove each of these elements is on the applicant. *Petrol Stops Northwest v. Continental Oil Co.*, 647 F.2d 1005, 1010 n.5 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981). Rule 24 receives a liberal construction in favor of the applicant for intervention. *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527 (9th Cir. 1983).

The issue in this case is whether the appellant has an interest sufficient to warrant intervention. Rule 24 does not require a specific legal or equitable interest, *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980), but "purely economic interests" are not sufficient for intervention in a NEPA action under *Portland Audubon*, 866 F.2d at 309. To justify intervention, the interest must be one "intended to be protected by the statute at issue—in this case, NEPA." *Id.*

CFA argues that they have significant, noneconomic interests. Additionally, they claim that their prior involvement with the EIS, its members' social and economic interests in the communities affected by a ban of herbicides, and the proper interpretation of NEPA give CFA an interest in the suit. Finally, CFA argues that it is entitled to intervene as an intended beneficiary of various statutes concerning the National Forests, 16 U.S.C. § 1601 et seq., 16 U.S.C. § 528-31, and 16 U.S.C. § 475, under *County of Fresno*, 622 F.2d at 437-38.

The district court's determination that CFA's noneconomic interests did not justify intervention was correct. An interest in the proper interpretation of a statute is not adequate for intervention. *See Dilks v. Aloha Airlines, Inc.*, 642 F.2d 1155, 1157 (9th Cir. 1981). Also, if CFA's prior involvement were sufficient, intervention would be too readily available. Nor can CFA claim that it is an intended beneficiary of the forestry statutes. In *County of Fresno*, the intervenors had previously obtained a court order requiring the rulemaking, 622 F.2d at 437, and were those intended to be protected by the statute at issue. *Portland Audubon*, 866 F.2d at 309. In the circumstances present here the forestry statutes do not create the interest necessary for intervention.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. CIVS-91-217-DFL-PAN

SALMON RIVER CONCERNED CITIZENS, CALIFORNIA COALITION FOR ALTERNATIVES TO PESTICIDES, INC., SAFE ALTERNATIVES FOR OUR FOREST ENVIRONMENT, INC., NORTHCOAST ENVIRONMENTAL CENTER, INC.,
Plaintiffs,

v.

DALE ROBERTSON, CHIEF FORESTER
UNITED STATES FOREST SERVICE,
UNITED STATES DEPARTMENT OF AGRICULTURE,
Defendant.

ORDER

[Filed July 22, 1991]

In this action, plaintiffs seek to compel defendant to comply with the National Environmental Policy Act ("NEPA"). The California Forestry Association ("CFA") has moved to intervene as a defendant. CFA is a California non-profit mutual benefit corporation representing forest products businesses and affiliated companies.

I. DISCUSSION

A. Intervention of Right

Federal Rule of Civil Procedure 24(a)(2) allows intervention of right when the applicant

> claims an interest relating to the property or transaction which is the subject of the action and . . . the

> disposition of the action may . . . impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Rule 24(a)(2) requires that the applicant have a "significantly protectable interest" (*Diamond v. Charles*, 476 U.S. 54, 68 (1986)), although it does not require a "specific legal or equitable interest."[1] *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980). Economic interests are insufficient to justify intervention in suits to compel agencies to comply with NEPA. *Portland Audobon Society v. Hodel*, 866 F.2d 302, 309 (9th Cir. 1989), *cert. denied*, 109 S.Ct. 3229 (1989). Where an intervenor's claim is not protected by the statute at issue, intervention of right is not justified in a suit to compel federal agencies to comply with federal statutes.[2] *Id.* at 309. In such a suit, "the governmental bodies charged with compliance can be the only defendants." *Id.* (quoting *Wade v. Goldschmidt*, 673 F.2d 182, 185 (7th Cir. 1982)).

In *Portland Audobon*, a timber industry association was denied leave to intervene in a suit by environmental groups challenging the Bureau of Land Management's alleged violation of NEPA in permitting logging of old-

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[1] The Ninth Circuit does not require an independent standing inquiry, but has recognized that standing is implicitly addressed by the requirement that an applicant must assert an interest relating to the property or transaction which is the subject of the action. *Portland Audobon Society v. Hodel*, 866 F.2d 302, 308 n.1 (9th Cir. 1989), *cert. denied*, 109 S.Ct. 3229 (1989).

[2] In *County of Fresno*, a farmers' organization was permitted to intervene in a suit to enjoin the Secretary of Interior from promulgating regulations for excess land sales authorized by federal reclamation acts until an environmental impact statement had been prepared. The organization was allowed to intervene because its members were "precisely those Congress intended to protect with the reclamation acts." *County of Fresno*, 622 F.2d at 438. *See Portland Audobon*, 866 F.2d at 309.

growth fir timber. The court held that the association did not have a "protectable" interest justifying intervention of right. Recognizing that the association had an economic interest in "ensuring a continued supply of timber from BLM lands," the court nevertheless denied intervention since "NEPA provides no protection for the purely economic interest that [the association] asserts[s]" and its claim had "no relation to the interests intended to be protected by . . . NEPA." *Id.* at 308-9.

CFA asserts that it has several protectable interests justifying intervention, including "an interest in a stable and continuing supply of timber." It also asserts that its members have recreational and environmental interests, an interest in ensuring proper interpretation of NEPA, and an interest arising from its prior involvement in the subject matter of the action.

Whatever the logic of CFA's arguments, the court is controlled by the Ninth Circuit's opinion in *Portland Audobon* holding that interests such as CFA's do not justify intervention of right in actions under NEPA. CFA represents companies which are "dependent upon timber from the national forests of California." This economic interest is insufficient to justify intervention. *Portland Audobon*, 866 F.2d at 309. CFA's asserted non-economic interests are intertwined with its economic interests. While CFA's By-Laws direct it to promote protection of forest lands and foster the management of public forests for public benefits, these directives further CFA's broader goal of ensuring a stable and continuing supply of timber for its timber-dependent member companies. CFA's interests are within the ambit of the economic interests precluded by the Ninth Circuit, even when recharacterized as interests in non-economic values supported by the responsible management of privately-owned timber. Because CFA does not represent interests which NEPA was enacted to protect, the governmental body charged with compliance is the only proper defend-

ant in this suit. *Id.* The court therefore holds that CFA is not entitled to intervention of right.[3]

B. Permissive Intervention

Federal Rule of Civil Procedure 24(b)(2) allows permissive intervention when

> an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice adjudication of the rights of the original parties.

CFA meets the first requirement for permissive intervention, since its defense and the main action have a question of law or fact in common. However, permissive intervention is "by definition subject to the discretion of the trial judge." *Chen Chi Wang v. United States*, 757 F.2d 1000, 1004 (9th Cir. 1985). The court is entitled to consider the nature and extent of the applicant's interest, its standing, the legal position it seeks to advance and its probable relation to the merits of the case, whether its interests are adequately represented by other parties, whether intervention will prolong or unduly delay the litigation, and whether the applicant will significantly contribute to the development of factual issues and to the equitable adjudication of legal questions. *Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326 (9th Cir. 1977).

The principal issue in this action is whether the defendant complied with NEPA, and defendant is the best source of information about its own actions. CFA would not significantly contribute to the factual and legal development of this action, and could unduly complicate the

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[3] Because the court finds that CFA's interest does not justify intervention of right, the court will not address the other requirements of Fed. R. Civ. P. 24(a)(2).

litigation. The court therefore denies permissive intervention.

However, the court grants CFA leave to file amicus curiae briefs in this matter and will entertain specific requests by CFA to participate at oral argument. CFA stated that it contemplated no discovery and primarily sought the opportunity to submit its own briefs and to participate in oral argument. CFA's participation as an amicus curiae will therefore be substantially similar to its requested participation as an intervenor. CFA will be able to fully present its opinions and protect its interests by ensuring that the court is thoroughly informed.

II. CONCLUSION

CFA's motion to intervene of right under Fed. R. Civ. P. 24(a)(2) or for permissive intervention under Fed. R. Civ. P. 24(b)(2) is denied. However, the court grants CFA leave to file amicus briefs and will consider specific requests by CFA to participate in any oral arguments in this matter.

IT IS SO ORDERED.

Date: 7/19/91

/s/ David F. Levi
DAVID F. LEVI,
Judge
United States District Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Civ. S-91-217 DFL

SALMON RIVER CONCERNED CITIZENS, CALIFORNIA COALITION FOR ALTERNATIVES TO PESTICIDES, SAFE ALTERNATIVES FOR OUR FOREST ENVIRONMENT, NORTHCOAST ENVIRONMENTAL CENTER,

Plaintiffs,

v.

DALE ROBERTSON, CHIEF FORESTER
UNITED STATES FOREST SERVICE,
UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant.

ORDER

[Filed June 15, 1992]

Plaintiffs challenge the sufficiency of the Environmental Impact Statement (EIS) supporting the Regional Forester's decision to authorize the use of herbicides on national forest lands in California and portions of Oregon and Nevada.

FACTUAL AND PROCEDURAL BACKGROUND

One of the Forest Service's objectives under the National Forest Management Act of 1976 is to produce a continuous supply of timber. The Forest Service seeks to meet this objective through reforestation.[1] One impedi-

[1] Reforestation, as defined by the EIS, includes "the reestablishment of trees and promotion of stand growth to achieve sustained

ment to reforestation is the competition the tree seeds and seedlings must endure from other plants for vital resources including soil moisture, nutrients, sunlight and space. The Forest Service, therefore, intervenes to assist tree seedlings through a vegetation management plan. Vegetation management is the manipulation of competing plants on a given site to further reforestation efforts and meet timber yield goals. The Region V Final EIS,[2] which is in dispute in this case, evaluates the use of herbicides as part of a vegetation management plan to assist tree seedlings.

The history of the Final EIS for Region V stretches back many years. An EIS for vegetation management was prepared in 1973. The process of updating this EIS was begun in 1981 and led to the release of a Draft EIS in 1983. Public briefings and hearings were held and various comments received. In 1984, while the draft EIS was under review, the Forest Service determined that further study was required before herbicides could be authorized for use. This decision was made in light of several court decisions that required an agency to undertake a worst case analysis concerning the safety of herbicides.[3] On March and April, of 1984, the Chief of the Forest Service and the Regional Forester for Region V placed a moratorium on the use of herbicides in Region V pending completion of a supplemental EIS. A supplement to the draft EIS that specifically addressed the use of herbicides was published in 1986. Responding

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yields of timber and maintain adequate numbers of trees growing at rates that will provide desired levels of multiple-use benefits." EIS vol. 1, S-2.

[2] Region 5 is referred to as the Pacific Southwest Region and includes 20 million acres of national forest lands in California, five counties of western Nevada, and one county in southern Oregon.

[3] *See Save Our Ecosystem v. Clark*, 747 F.2d 1240 (9th Cir. 1984) and *Southern Oregon Citizens Against Toxic Sprays v. Clark*, 720 F.2d 1475 (9th Cir. 1983).

to court rulings and public comments, the supplement provided a worst case analysis and updated previously considered risks to human health, soils, water quality and wildlife from herbicide use. The supplement was prepared by the Forest Service with assistance from professional consultants, and the draft of the supplement was circulated to interested individuals for comment. The Final EIS, published in December 1988, incorporates and responds to public comments to both the 1983 draft and the 1986 supplement. *See* EIS, vol. 1, pg. ii, vol. 2, pg. I-2.

The Record of Decision (ROD) by the Regional Forester, adopting the recommendation of the Final EIS, was issued on February 27, 1989. Following the internal administrative appeal process, on January 7, 1991, the Secretary of Agriculture issued a final decision affirming the ROD and lifting the moratorium on herbicide use in Region 5.

The Final EIS presents and evaluates eight alternative vegetation management programs, each employing several methods of controlling vegetation, including mechanical, thermal, manual, chemical and biological controls. Each alternative emphasizes a specific objective, such as cost-effectiveness, maximizing timber production, maximizing employment opportunities, preservation of nontimber resources, or minimizing or prohibiting the use of herbicides. Most of the alternatives allow all methods of vegetation control, but emphasize those methods which would achieve the targeted objective. The only alternatives which limit the methods of vegetation management are alternative 3 (which prohibits the application of herbicides) and alternative 4 (which prohibits only the aerial application of herbicides).

The EIS evaluates the effect of each of the eight alternatives on a number of areas including, soil and water quality, air quality, vegetation, timber yields, forest productivity, wildlife, fisheries, endangered animals and

plants, human health and safety, cultural resources, and scenic quality. The socioeconomic effects of the various alternatives are evaluated including the economic efficiency and cost of the alternative approaches.

The human health and safety evaluation of the various alternatives considers risks to forest workers and to the public. The EIS includes a lengthy worst case and risk analysis to evaluate the potential health effects from herbicides. This analysis of human health risks has all the outward "indicia of comprehensiveness." *Oregon Environmental Council v. Kunzman*, 817 F.2d 484, 491 (9th Cir. 1987). The worst case analysis substitutes for gaps in the existing data concerning. "(1) Health effects of the herbicides seen in humans; (2) Animal studies for certain toxicity endpoints (for example, cancer studies); (3) Exposure studies on humans." EIS at 4-65. To compensate for the gaps in the data, the EIS undertakes a risk analysis that examines the following kinds of potential exposure to herbicides: from normal ground spraying to workers and the public, from normal aerial spraying risks to workers and the public, general and specific risks from abnormal operations, and accident risks. For each of these categories a realistic case, conservative case and worst case exposure is assumed, and the risks calculated accordingly. The estimates are based upon exposure caused by spray drift, by contact with dried herbicide on vegetation, by ingestion of food or water contaminated in aerial or ground applications, and by inhalation by persons who burn contaminated firewood. *Id.* at 4-80. The EIS attempts to cumulate the doses a person might receive through different routes, for instance adding the spray drift exposure to the contaminated food and water dose. The maximum exposed individual (MEI) dose combines the risk from spray drift, inhalation of vapor from burning contaminated firewood, and the contaminated food and water dose. Finally, the lifetime exposure risk for a 70-year lifetime is calculated for analysis of cancer risk. In this analysis, the EIS assumes that in the

realistic case a member of the public might be exposed to spray drift three times in a 70-year lifetime, six times in the conservative case, and nine times in the worst case. Another estimate of lifetime cancer risks for hikers or backpackers in the sprayed areas assumed 70 to 700 exposures in a 70 year lifetime.

Based upon its evaluation of the different alternative vegetation management techniques, the Final EIS selects a recommended alternative that emphasizes local management and permits local forest managers to use herbicides where essential to achieve resource management objectives. In the ROD the Regional Forester adopted the alternative recommended in the EIS. In reaching this decision the Regional Forester relied on five considerations:

> (1) should treatment method selection authorities, historically delegated to the National Forests, be wholly or partially withdrawn to the Regional level?; (2) effects of herbicides on health risks to the general public and workers; (3) effects on nontimber resources; (4) effects on timber yield and their influence on employment and local economies; (5) feasibility of implementation.

ROD at 2.

The EIS is a programmatic statement that provides general guidance to the national forests in Region V on appropriate vegetation control during reforestation projects. The EIS does not initiate or compel any treatment projects. By emphasizing the discretion of local forest managers, the EIS leaves the decision whether to use herbicides to the local manager. The EIS intends that site-specific analysis, including environmental analyses, will be part of any actual project planning.

Plaintiffs challenge the ROD arguing that the EIS fails to adequately disclose and analyze the human health risks from inert ingredients and cumulative effects, and the risks of chemically sensitive individuals. These argu-

ments were previously advanced by plaintiffs in their administrative appeal of the ROD. The Secretary denied the appeal in a lengthy decision dated January 7, 1991.

ANALYSIS

The National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq. requires the preparation of an EIS for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). NEPA sets forth "action-forcing" procedures designed to fully inform agency decision-makers of the environmental impact of their decisions. *Trustees for Alaska v. Hodel*, 806 F.2d 1378, 1382 (9th Cir. 1986). The reason for the EIS requirement is that "decisions that are based on understanding of the environmental consequences" will "protect, restore and enhance the environment." 40 C.F.R. § 1500.1(c). An EIS must compile "full and fair" information on the significant environmental impacts and alternatives of the proposed action. 40 C.F.R. § 1502.1. The purpose of the draft EIS is to "inform decision-makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1.[4] Thus the EIS is intended to "provide decision makers with enough information to aid in the substantive decision whether to proceed with the project in light of its environmental consequences and to provide the public with information and an opportunity to participate in gathering information." *Northwest Coalition for Alternatives to Pesticides v. Lyng*, 673 F. Supp. 1019, 1022 (D. Or. 1987).

[4] The draft and final environmental impact statements must be circulated to: (1) any federal agency with jurisdiction or special expertise with regard to any environmental impact; (2) any federal, state or local agency responsible for development or enforcement of environmental standards; (3) the applicant, if any; (4) any person organization or agency requesting the statement; and (5) any person, organization or agency which submitted substantive comments to the draft statement. 40 C.F.R. § 1502.19.

A. *Standard of Review*

The district court reviews an EIS to determine whether it was prepared by the Forest Service in accordance with the procedure required by 5 U.S.C. § 706(2)(D).[5] The Ninth Circuit employs a "rule of reason": An EIS must contain a "reasonably thorough discussion of the significant aspects of the probable environmental consequences" and make a reasoned decision. *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519 (9th Cir. 1992). "The reviewing court may not substitute its judgment for that of the agency concerning the wisdom or prudence of a proposed action." *Oregon Environmental Council v. Kunzman*, 817 F.2d 484, 492 (9th Cir. 1987). "A reviewing judge must make 'a pragmatic judgment whether the EIS's form, content and preparation foster both informed decision-making and informed public participation. . . . Once satisfied that a proposing agency has taken a "hard look" at a decision's environmental consequences, the review is at an end.'" *Mumma*, 956 F.2d at 1519, quoting *State of California v. Block*, 690 F.2d 753 (9th Cir 1982). "The reviewing court may not 'fly speck' an EIS and hold it insufficient on the basis of inconsequential, technical deficiencies." *Kunzman*, *supra*, 817 F.2d at 492.

Moreover, in reviewing an EIS, the court should give latitude to the agency to rely upon its own experts.[6] "When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 378, 109 S.Ct. 1851, 1861 (1989). "NEPA does not re-

[5] A reviewing court must "hold unlawful and set aside agency action, findings, and conclusions found to be without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

[6] In this case, the agency's experts are highly qualified, even eminently so, in the areas in which they specialize.

quire that [the court] . . . resolve disagreements among various scientists as to methodology. . . . Our task is simply to ensure that the procedure followed by the [agency] resulted in a reasoned analysis of the evidence before it, and that the [agency] made the evidence available to all concerned." *Oregon Environmental Council v. Kunzman*, 817 F.2d 484, 496 (9th Cir. 1987).

B. *Standing and Ripeness*

Defendant argues that plaintiffs have no standing to assert these claims and that plaintiffs' claims are not ripe for adjudication. Defendant's standing and ripeness arguments are of a piece. Defendant suggests that this EIS is merely a programmatic EIS setting Forest Service policy. Defendant argues that plaintiffs suffer no injury and have no present case or controversy when challenging a programmatic EIS and may only challenge the site-specific environmental assessment ("EA") which irretrievably commits resources.

This argument was recently rejected by the Ninth Circuit in *Idaho Conservation League v. Mumma*, 956 F.2d 1508 (9th Cir. 1992). The court held that requiring plaintiffs to wait until a government agency acts on a specific project would not yield an adequate remedy, particularly since the challenge to the site-specific action would be subject to the defense that the overall plan had been approved. *Id.* at 1519. "To the extent that the plan pre-determines the future, it represents a concrete injury that plaintiffs must, at some point, have standing to challenge. That point is now or it is never." *Id.* at 1516. In light of the decision in *Mumma*, plaintiffs have standing to challenge the programmatic EIS and their claims are now ripe.[7]

[7] To the extent that the EIS defers consideration of certain environmental impacts to a site specific environmental assessment or supplemental EIS, plaintiffs will have a further opportunity to challenge the use of herbicides in any specific location. Nonetheless,

C. *Cumulative Impact*

Plaintiffs assert that the EIS inadequately analyzes the cumulative impact of the use of herbicides in vegetation management. Plaintiffs assert that the EIS fails to consider other users of herbicides and the effects of long term exposures to all chemicals. The Forest Service asserts that cumulative effects are best studied in relation to specific projects and that therefore it may properly defer assessment of cumulative impacts until the preparation of site-specific Environmental Assessment's (EA's) or EIS's, under the principle of tiering.[8] The Forest Service also argues that any cumulative impacts from other herbicide users or exposures are sufficiently accounted for as part of the methodology used in the risk analysis which assumes that the herbicides are more dangerous than the data indicates and that the exposures are greater than expected.

NEPA requires that cumulative or synergistic effects be considered in an EIS.[9] *Kleppe v. Sierra Club*, 427 U.S. 390, 411, 96 S.Ct. 2718, 2730 (1976); *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1312 (9th Cir. 1990); 40 C.F.R. § 1508.25(c)(3). Agencies are encouraged to tier[10] their environmental impact statements to

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those matter which are considered and evaluated in the Final EIS, and which are not deferred for a second tier review, are now ripe for review and plaintiffs have standing.

[8] At oral argument counsel for the Forest Service noted that site specific analysis might be either an EA or an EIS. Transcript at 7.

[9] " 'Cumulative impact' is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. 1508.7

[10] Tiering is defined in 40 C.F.R. § 1508.28 as "the coverage of general matters in broader environmental impact statements (such

eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review. 40 C.F.R. § 1502.20; *Southern Oregon Citizens v. Clark*, 720 F.2d 1475 (9th Cir. 1983) (permitting the BLM to consider worst case analysis of scientifically uncertain issues in annual EA rather than preparing a new or supplemental EIS).

The court finds that defendant's use of tiering is appropriate in this case. Certain issues are best considered at different stages of a project. To undertake a study of cumulative impacts due to other herbicide users and other exposures to chemicals, on a region wide basis, of a region consisting of some 20 million acres, at the programmatic level when no decision to use herbicides had yet been reached by local forest managers, would be burdensome, hypothetical, and unproductive. Certainly, it is not arbitrary or capricious to consider the cumulative impact of other users or exposures on a site-specific basis. A decision-maker at the project level can more easily evaluate the type and amount of herbicide to be used, the method and number of applications, the number of acres involved, topography, soil consistency of the acres to be affected, the number and proximity of persons residing in the vicinity, and the identify of other potential users.

Plaintiffs argue that an agency may not tier, and thereby defer, its evaluation of environmental impacts, if it is possible to consider the impacts at the programmatic level. *Thomas v. Peterson*, 753 F.2d 754, 759 (9th Cir. 1985). However, the detailed analysis of cumulative

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as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared. . . . Tiering is appropriate when it helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe."

and synergistic effects may be unwarranted when a government agency has not yet authorized or recommended approval of a specific project. *See Northern Alaska Environmental Center v. Lujan*, No. 91-35296, (9th Cir. April 14, 1992) (holding that an EIS's deferral of consideration of certain potential cumulative and synergistic effects is proper tiering and does not foreclose later analysis of these factors in a future EA). A cumulative impact discussion need only be adequate for the purpose of evaluating the eight vegetation management alternatives. *See id.* The Forest Service represents that it will disclose and discuss cumulative impacts of herbicides at a later time prior to application. Whether this discussion will be sufficient in an EA or whether a supplemental EIS is required is left to another day.[11] Judicial estoppel precludes the Forest Service from later arguing that it need not consider the cumulative impacts of herbicide use. *See id.* at ——; *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990).

Plaintiffs concede that a much more specific analysis can be done at the forest level but argue that the EIS fails to include a sufficient discussion of risk from exposure to chemicals from other sources. Using a pragmatic approach and the rule of reason, the court finds

[11] Although acknowledging that cumulative impacts cannot be studied over the whole of Region V, the Environmental Protection Agency ("EPA") criticizes the Final EIS for lacking cumulative risk assessment, particularly of the cumulative impact on watershed and air basin quality. The EPA states that an intermediate NEPA document is needed in order to ensure that the cumulative impact analysis issues are adequately addressed. EPA Comments, April 1989. Moreover, "EPA believes that, traditionally, site-specific Environmental Assessments (EA) have ignored cumulative impacts. By their very nature they tend to be limited to a narrow focus." *Id.* Site specific EA's or EIS's prepared prior to particular herbicide applications must consider cumulative effects in light of other herbicide applications by the Forest Service or other entities and must consider any cumulative effects resulting from the site specific application, even those effects occurring beyond the site area—for example, in a watershed or air basin.

that this objection is not fatal to the EIS. According to the Forest Service's professional experts, the EIS's use of a worst case analysis, for exposure to herbicides sprayed by the Forest Service, adequately takes into account exposures from other sources. By assessing a risk greater than average in exposure amount and toxic effect, the EIS provides sufficient guidance as to the possible cumulative effects from other sources and sufficient guidance to permit a reasonable choice among the alternatives evaluated. Although a more direct discussion of other sources of exposure would have been preferable,[12] if only to incorporate by reference the analysis and discussion of data gaps for human risks from forest service herbicide applications, the approach adopted is sufficient to pass the rule of reason for a programmatic EIS. *See Oregon Environmental Council v. Kunzman*, 614 F. Supp. 657, 662 (D.C.Or. 1985), *affirmed and adopted*, 817 F.2d 484, 495 (9th Cir. 1987).[13] In short, the court concludes that both the worst case assessment, and the discussion in the EIS justifying the use of a worst case approach, serves adequately to address the question of other sources and exposures to herbicides.

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[12] The EIS acknowledges the likelihood of other exposures to herbicides. See, e.g., EIS at 4-114 ("the diets of exposed people may have some influence on the toxicity of the herbicides. This is one of several factors that may influence the sensitivity of individuals"); 4-71 ("it would be very difficult to identify a sample population that would be large enough to differentiate between cancer induced by exposure to an herbicide and that caused by exposure to other environmental factors, such as diet, smoking, polluted air, or drinking water"); 4-118 ("cumulative exposure also could occur if an individual used an herbicide on a garden or lawn at the same time he was exposed to an herbicide from the spray program described in this EIS").

[13] The Forest Service should react cautiously to this holding that this portion of the programmatic EIS is adequate. The court accepts the representation that a thorough analysis of cumulative impacts is forthcoming at a later stage when the decision to apply herbicides is reached by local forest managers.

The EIS also adequately addresses the synergistic effects of various chemicals at a programmatic stage of analysis. In *Kunzman*, an EIS which simply disclosed that the actual synergistic effects of the pesticide were unknown was found adequate. 614 F. Supp. at 662. Here the EIS defines a synergistic effect and discusses the improbability of a synergistic effect and the unlikelihood of exposure to multiple herbicides. *See* EIS at 4-112-114. This discussion is sufficient to inform the public and the decision-maker of the synergistic impacts relevant at a programmatic stage.

D. *Risks due to Inert Ingredients*

Plaintiff asserts that the toxic and synergistic effects of the inert ingredients of the proposed herbicide formulations are not adequately disclosed in the Final EIS. Defendant asserts that this information is not necessary because the worst case risk for active ingredients, which is studied, was overstated, thus encompassing any potential risk from inerts.

In preparation of the EIS, the Forest Service requested manufacturers and the EPA to identify inert ingredients in the formulations of herbicides under evaluation. The EPA identified only those inert ingredients on Lists 1 and 2,[14] inerts of toxicological concern or first priority for further testing. Inerts of unknown toxicitly, were not identified or analyzed in the programmatic EIS. Decl. of Gross.

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[14] The EPA classifies inert herbicide and pesticide ingredients into four lists: List 1 contains 55 inserts considered "inerts of toxicological concern;" List 2 contains 50 chemicals considered "potentially toxic inerts, with a high priority for testing;" List 3 contains 800 chemicals considered "inerts of unknown toxicity;" and List 4 contains 300 "inerts of minimal concern." *See* 55 Fed. Reg. 33762 (August 17, 1990); EIS at 4-116—4-117.

The Ninth Circuit found a similar discussion of the risks inherent in inert ingredients adequate in *Northwest Coalition for Alternatives to Pesticides v. Lyng*, 844 F.2d 588, 597-8 (9th Cir. 1988). In *Northwest*, the government acknowledged the presence of inerts in the proposed herbicide formulation and asked the EPA to determine whether any of the inert ingredients were harmful or potentially harmful. The EPA reported that Esteron-99 contains kerosene, a potentially toxic inert, but declined to identify other inerts in conformity with its policy classifying inert ingredients as "Confidential Business Information." The government in *Northwest* disclosed that only the toxicity of the active ingredients, and not that of either the formulations or the inerts had been analyzed, but concluded that the primary risk was the active ingredient and that the overstatement of risk contained in the analysis of the risk of the active ingredient adequately described the overall risk of the formulations as well. The court in *Northwest* agreed and found that the disclosure and analysis was sufficient under NEPA.

Plaintiffs argue that this case is not governed by *Northwest* since the record demonstrates that the identities of the inert ingredients could be obtained. However, the declarations of the Forest Service's experts and the plaintiffs' experts are in conflict as to (1) whether any meaningful information concerning the inerts was readily available, and (2) whether an inquiry into the inerts ingredients has any importance. Because the agency is entitled to rely on its experts, the court does not find Northwest distinguishable on the basis suggested. The Forest Service also states that information concerning the inert ingredients is now available and will be revealed in the tiered assessment to be undertaken when any particular application of an herbicide is contemplated.[15]

[15] The court suggests that the Forest Service would do well to specifically address the effects of the inerts, if any, now that their identity may be known.

E. *Chemically Sensitive Individuals*

Plaintiffs argue that the Final EIS fails to provide "full disclosure" of environmental impacts of herbicide use because it does not adequately describe how persons with multiple chemical sensitivities ("MCS") or hypersensitive individuals will be affected by herbicide use.[16] Defendants contend that MCS syndrome is not a scientifically definable or verifiable hypothesis, and that the causation and risks plaintiffs attribute to MCS are speculative. Defendants further contend that they are not obligated to discuss all speculative impacts or theories advanced by any expert.

The EIS expressly considers effects on sensitive individuals. It identifies factors that affect the sensitivity of individuals, considers allergic hypersensitivity, and discusses the likelihood of effects in sensitive individuals. EIS at 4-114-116. The EIS notes that:

> Based on the current state of knowledge, individual susceptibility to the toxic effects of the 13 herbicides cannot be specifically predicted. . . . Safety factors have traditionally been used to account for variations in susceptibility among people. The margin-of-safety approach used in the risk assessment takes into account much of the variation in human response . . . [A] safety factor of 10 is used for interspecies variation, an additional safety factor of 10 is used for within-species variation. Thus, the normal margin-of-safety of 100 for both types of variation is sufficient to ensure that most people will experience no toxic effects. However, unusually sensitive individuals may experience effects even when the margin of

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[16] Plaintiffs define MCS as a "syndrome where individuals experience adverse, often debilitating, acute and chronic health effects when exposed to *any* amount of an offending substance. Hypersensitivity describes those people whose immune systems have become highly sensitized to herbicides (or other chemicals) and who experience adverse health effect to *minute* amounts, even order of magnitude less than would affect the average person." Plaintiff's Response and Reply at 29, n.25.

> safety is equal to or greater than 100. . . . In particular, in instances of the risk assessment where margins of safety are less than 100 for an exposure to a particular herbicide, it is possible that an exposed sensitive individual would experience toxic effects, whereas the average person would not. It must be noted, however, that sensitive individuals compose only a fraction of the population at large and it is not likely that a sensitive individual would be among those few people who might be exposed in any of the Forest Service's applications.

EIS at 4-115-116.

The court finds that the discussion of the effects of herbicide use on sensitive individuals is adequate. An EIS need not quantify every risk, particularly less likely risks. Moreover, the risk analysis used by the government, a margin of safety of 100, is the scientifically accepted method. The scientific uncertainty regarding the cause and extent of the risks, while not dispositive, does reduce the detail which the EIS can reasonably provide.

The EIS's discussion of the risk to chemically sensitive individuals, although not thorough, satisfies the rule of reason.

CONCLUSION

Plaintiffs have standing to assert their challenges to the sufficiency of the Final EIS and ROD of December 1988. The challenge to the disclosure of risks to chemically sensitive individuals is rejected. The claim that the EIS fails adequately to evaluate inert ingredients must be denied. Finally, the assertion that cumulative effects must be more carefully examined is denied at the programmatic stage. The court finds that the "EIS's form, content, and preparation foster both informed decision-making and informed public participation." *Mumma*, supra, 956 F.2d at 1519. Plaintiffs' motion for summary

judgment and injunctive relief is denied and defendants motion for summary judgment is granted.[17]

IT IS SO ORDERED.

Dated: 12 June 1992.

/s/ David F. Levi
DAVID F. LEVI
Judge
United States District Court

[17] While this motion was pending, the parties filed a renewed round of briefing concerning plaintiffs' motion for preliminary injunction. This court has not considered these pleadings in preparing this opinion but has confined itself to the pleadings submitted for the summary judgment motions. Those pleadings were already voluminous.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Case Number: CIVS 91-217 DFL

SALMON RIVER CONCERNED CITIZENS, *et al.*

v.

DALE ROBERTSON, *et al.*

Judgment in a Civil Case

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THIS CASE IS DISMISSED PURSUANT TO THE GRANTING OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Date 6/15/92

/s/ Jack L. Wagner
Clerk

/s/ [Illegible]
(By) Deputy Clerk

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Civil No. 91-217-DFL-PAN

SALMON RIVER CONCERNED CITIZENS, *et al.*,
Plaintiffs,

v.

DALE ROBERTSON, Chief Forester
UNITED STATES FOREST SERVICE,
UNITED STATES DEPARTMENT OF AGRICULTURE,
Defendant,

and

CALIFORNIA FORESTRY ASSOCIATION,
Defendant-Intervenor.

MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE BY CALIFORNIA FORESTRY ASSOCIATION

[Filed May 24, 1991]

INTRODUCTION

The California Forestry Association ("CFA") has moved for intervention of right under Federal Rule of Civil Procedure 24(a)(2) or, alternatively, for permissive intervention under Rule 24(b)(2). CFA is a California Non-Profit Mutual Benefit Corporation with its principal place of business in Sacramento, California. *See* Exhibit A attached, Declaration of William N. Dennison, ¶ 2 (hereinafter "Dennison Declaration ¶ —"). CFA represents approximately 82 forest products businesses

and affiliated member companies, many of which are dependent upon timber from the national forests of California (*i.e.*, Region V of the United States Forest Service) and or own private timber land adjacent to or within the boundaries of these national forests. *Id.* As the following discussion demonstrates, CFA and its members have significant economic and environmental interests in the instant action which will not be represented by other parties if CFA is not granted intervention.

I. CFA Should Be Granted Intervention As Of Right.

CFA's members, employees and their families actively use and enjoy the natural resources of the national forests of California. CFA and its members and employees not only rely upon the timber supply from the national forests of California for their livelihoods, but also use the national forests for recreation and enjoyment. *See* Dennison Declaration, ¶ 3. As an intervenor, CFA would represent these and other interests of its members. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 97 S.Ct. 2434 (1977).

Rule 24(a)(2) of the Federal Rules of Civil Procedure sets forth four criteria which govern intervention of right:

1. Whether the application is timely;
2. Whether the applicant claims an interest relating to the property of transaction that is the subject matter of the action;
3. Whether disposition of the action will as a practical matter impede or impair the applicant's efforts to protect it's interests; and
4. Whether the existing parties will adequately represent the interests of the applicant.

County of Fresno v. Andrus, 622 F.2d 436, 438 (9th Cir. 1980) (granting intervention to land buyers in a National Environmental Policy act case).

Further, Rule 24 "is broadly construed in favor of applicants for intervention." *United States v. State of Oregon*, 839 F.2d 635, 637 (9th Cir. 1988). The 1966 amendments to Rule 24(a)(2) embody a strong policy that intervention should be granted to "as many apparently concerned persons as is compatible with efficiency and due process." *County of Fresno*, 622 F.2d at 438.

CFA satisfies each of the criteria for intervention of right under Rule (a)(2).

A. This Motion To Intervene Is Timely.

The complaint in this action was filed on February 21, 1991, and the federal defendant's answer was filed on April 19, 1991. A pretrial scheduling conference has been set for May 24, 1991. As of the drafting of this memorandum, no motions addressing the merits of this case have been filed or scheduled. Counsel for defendant has been notified of this motion and represents that defendant does not object to CFA's intervention. Counsel for plaintiffs has stated that plaintiffs will oppose this motion. CFA, however, represents that it will abide by any schedule which this Court establishes for the ultimate disposition of this case. Therefore neither plaintiffs nor defendants will be prejudiced or suffer any undue delay by CFA's intervention. Accordingly, at this early stage in this litigation, CFA's motion for intervention is timely.

B. CFA Has Direct Interests In This Case.

Rule 24(a)(2) is satisfied "when the applicant claims an interest relating to the property or transaction which is the subject of the action." The "interest" test is an easily met "threshold one" which seeks to involve "as many apparently concerned persons as is compatible with efficiency and due process". *County of Fresno*, 622 F.2d at 438. The "interest" test for intervention is more easily met than the different "zone of interests" test for stand-

ing. *See Portland Audubon Society v. Hodel*, 866 F.2d 302, 308 n.1 (9th Cir. 1989). CFA has several "significantly protectable interests" which qualify for intervention of right.

First, as a representative of the major purchasers of timber from the national forests of California, CFA has an interest in a stable and continuing supply of timber. Many of CFA's members depend upon a continuing supply of timber from the national forests of California for their economic livelihood and reasonably expect to receive the award of federal timber sale contracts from these forests in the future. *See* Dennison Declaration, ¶¶ 3 and 11. The injunctive relief sought by plaintiffs in the instant action would substantially impair the economic interests of CFA and its members by reducing the availability supply of timber for future timber sales from the national forests. *Id.* at ¶ 10. CFA and its members have a direct interest in insuring that a "continuous supply of timber" is offered in the future by the Forest Services as the 1897 Organic Act directs. 16 U.S.C. § 475. Intervention of right should be granted to allow CFA to protect the future contractual interests of its members and their interest in the statutory obligation of the Forest Service providing a continuous supply of timber. The liberal "interests" test does not require a present legal or property interest. *See Blake v. Pallan*, 554 F.2d 947, 952-54 (9th Cir. 1977).

Second, CFA and its members have an interest in insuring the proper interpretation of the National Environment Policy Act ("NEPA") as applied by the Forest Service to the national forests. *See* Dennison Declaration, ¶ 2. Plaintiffs clearly seek an interpretation of NEPA which is contrary to the interests of CFA and its members. The court's ruling here would have *stare decisis* effects on how NEPA is interpreted in other settings involving the national forests of California. "The inhibiting effect of *stare decisis* . . . furnishes the practical disadvantage required for intervention as of right." *Corby*

Recreation, Inc. v. General Electric Co., 581 F.2d 175, 177 (8th Cir. 1978); *see also United States v. State of Oregon*, 839 F.2d at 638.

Third, CFA and its members have specific interests in the protection of the national forests in California from environmental harm including, protection of the forests from the danger of wildfire, insect infestation, diseases and erosion. *See* Dennison Declaration, ¶ 4. CFA and its members have demonstrated through their past activities their commitment to the preservation and regeneration of the resources of these national forests. *See* Dennison Declaration, ¶¶ 5, 6, and 8. Thus, CFA and its members have a direct interest in the proper and timely application of the requirements of NEPA and its regulations to national forest resources. This provides a distinct non-economic interest of CFA in the precise subject of the instant action.

Fourth, CFA and its members have been substantially involved in the public process leading to the development of the record of decision and final environmental impact statement for Vegetation Management for Reforestation which is the subject matter of the instant action. CFA and its members have participated both formally and informally in the initial scoping process and filed extensive comments in response to the draft and supplemental EIS's issued by the Forest Service. CFA also intervened in plaintiffs' administrative appeal from the record of decision and the final environmental impact statement. *See* Dennison Declaration, ¶ 5. This "prior involvement" merits intervention of right. *Resources Limited, Inc. v. Robertson*, No. CV 89-41-H-CCL, slip. op. 5 (D. Mont. March 5, 1990) (granting intervention to Intermountain Forest Industry Association in an NFMA and NEPA suit brought by environmental groups) (copy attached as Exhibit B).

Fifth, CFA and its members have social-economic interests in the quality of life in the communities in which

they reside, and environmental interests in the national forests of California. *See* Dennison Declaration, ¶ 3. If plaintiffs' action is successful, it could impair this quality-of-life interest by reducing timber sale revenues to local communities and counties of California. Approximately 25% of the receipts from Forest Service timber sales on national forests in California is returned to the counties. *Id.*, ¶ 11. CFA also believes that the relief sought (an injunction against the use of herbicides) could harm the environment by resulting in substantially reduced reforestation. In addition, CFA believes that a ban on the use of herbicides and the resulting over-emphasis on mechanical and other means of vegetative management would be less safe and increase the risk of harm to individuals. *Id.*

Recognizing the importance of hearing the forest products industries' interests, courts have granted intervention to the industry in analogous circumstances involving environmental group suits on forest management brought under NEPA and other statutes. *See, e.g., Resources Limited, Inc. v. Robertson*; *Idaho Conservation League v. Mumma*, No. CV 88-197-M-CCL (D. Mont. April 10, 1989) (granting intervention to an association of timber companies in a NEPA suit involving the Idaho Panhandle National Forest (copy attached hereto as Exhibit C); *see also Swan View Coalition, Inc. v. Turner*, CV 89-121-H-CCL (D. Mont. January 2, 1991) slip op. at 3-8. granting intervention of right to an association of timber companies in an action brought under the Endangered Species Act) (copy attached as Exhibit D). Similarly in this case, the Court should grant intervention of right to CFA here.

As the foregoing discussion demonstrates, CFA has numerous interests relating to the property or transaction that is the subject of the instant action which are both economic and non-economic and which pertain directly to the Forest Services' compliance with NEPA.

(This is not a case in which the intervenor applicant claims only economic interests, such as in *Portland Audubon Society*, 866 F.2d at 308).

C. Disposition Of This Action Will, As A Practical Matter, Impede Or Impair CFA's Efforts To Protect Its Interests.

That final deposition of this case may, as a practical matter, impair the ability of CFA and its members to protect their economic and non-economic interests is fully demonstrated by the discussion in Section I(B) above. The threatened reduction in timber supply, the reduction in receipts to counties and dependent communities, the reduced quality of life resulting from inadequate reforestation and the threatened interests of CFA in the Forest Service's compliance with NEPA procedures and processes more than satisfy this prong of the intervention "interests" test.

D. CFA's Interests Are Not Adequately Represented By Existing Parties.

The burden of showing inadequate representation for purposes of a motion to intervene "should be treated as minimal." *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538, n. 10, 92 S.Ct. 630, 636 n. 10, (1972); *United States v. Stringfellow*, 783 F.2d 821, 827 (9th Cir. 1986), *vacated and remanded on other grounds, sub nom. Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 107 S.Ct. 1177 (1987). It is obvious that plaintiffs do not represent CFA's interests. Moreover, CFA has distinctly different interests from the federal defendants which will not be represented if CFA is not permitted to intervene.

First, CFA's members have obvious future economic and contractual interests in the sale of timber from the national forests. Federal defendants to not have this

specific interest and cannot be depended upon to represent CFA adequately.

Secondly, as an active participant in the forest planning process for each of the national forests plans under preparation in the State of California, CFA has separate and distinct interests from the defendant in the rapid finalization of those plans, each of which incorporates and is dependent upon the appropriate use of herbicides as authorized by the record of decision and final environmental impact statement for Vegetation Management for Reforestation. *See* Dennison Declaration, ¶ 10. CFA's interests are two-fold in this respect. CFA's members rely upon the continuous supply of timber which is called for in these plans and which is dependent upon the appropriate use of herbicides for reforestation. Thus, CFA believes there is a critical linkage between the national forest planning process and the record of recision and final environmental impact statement for Vegetation Management for Reforestation. It is unclear whether the federal defendants share this belief and concur in CFA's view that the national forest plans which incorporate the Vegetation Management for Reforestation guidelines obligate the Forest Service to offer a continuous and adequate supply of timber for sale. In addition, CFA, as an active participant in the national forest planning process and in the public process leading to the development of the record of decision and the final environmental impact statement for Vegetation Management for Reforestation, has a direct interest in seeing these NEPA driven processes are completed in a timely and correct manner. CFA believes that plaintiffs' claims in this action are without merit and aimed only at prolonging the implementation of policies which have long since been thoroughly analyzed and reviewed in full compliance with all NEPA requirements.

Thirdly, since many CFA members own private timber land adjacent to or within the boundaries of the national

forests in California, they have a separate and distinct interest in any judicial decision which may ultimately restrict the use of herbicides on those forests and thereby directly or indirectly impact and unduly restrict the use of herbicides by CFA members on their private lands. *See* Dennison Declaration, ¶ 12. The interest of CFA and its members in the potential impact on private land of a judgment in this action is an interest which the federal defendants cannot share.

Finally, and most importantly, the timber industry deserves to be heard in this action. Plaintiffs represent only environmental interests and defendants represent only the interests of the federal government. CFA and its members represent distinctively different interests necessary to a fully informed decision by this Court on the important issues raised in this action.

II. CFA Should Be Granted Permissive Intervention

If this Court does not grant intervention of right to CFA, it should grant CFA permissive intervention under Rule 24(b)(2). As demonstrated above, CFA's intervention would not unduly delay or prejudice the adjudication of the rights of the original parties. Further, CFA clearly satisfies the requirement of Rule 24(b)(2) that the "applicant's claim or defense in the main action have a question of law or fact in common." CFA's immediate and specific interest in the resolution of the NEPA issues raised in the complaint, and CFA's substantial interest in the Forest Service's proper compliance with NEPA and its implementing regulations plainly establish common questions of law or fact. Most importantly, CFA and its members represent interests obviously threatened if the relief sought in this action is granted and intervention by CFA is necessary to assure that all issue pertinent to the Court's final decision have been fully ventilated and that the Court has heard from all concerned points of view.

In other cases involving associations of forest products companies as intervenor-applicants, courts have frequently granted at least permissive intervention with respect to NEPA-related issues. *See*, e.g., the attached orders from *Resources Limited, Inc. v. Robertson* and *Idaho Conservation League v. Mumma* (attached as Exhibits B and C hereto).

CONCLUSION

For each of the foregoing reasons, CFA respectfully requests that the Court grant its motion for leave to intervene as of right or, in the alternative, exercise is discretion to grant permissive intervention.

Dated: May 24, 1991

Respectfully submitted,

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APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Civil No. 91-217-DFL-PAN

SALMON RIVER CONCERNED CITIZENS, *et al.*,
Plaintiffs,

v.

DALE ROBERTSON, Chief Forester
UNITED STATES FOREST SERVICE,
UNITED STATES DEPARTMENT OF AGRICULTURE,
Defendant,

and

CALIFORNIA FORESTRY ASSOCIATION,
Defendant-Intervenor.

DECLARATION OF WILLIAM N. DENNISON

I, William N. Dennison, declare under penalty of perjury that the following is true and correct to the best of my personal knowledge and belief:

1. I am the President of the California Forestry Association ("CFA"), formerly known as the Timber Association of California, whose offices are located at 1311 I Street, Suite 100, Sacramento, California. I have served in this position since the founding of the Timber Association of California on June 15, 1988. Prior to that time I was President of the Western Timber Association (from 1980-1988) which merged with the California Forest Protective Association to form the Timber Association of California. The Timber Association of California

changed its name to the California Forestry Association in April, 1991.

2. CFA is a California Non-Profit Mutual Benefit Corporation consisting of approximately 82 forest products companies and affiliated businesses in the state of California. Many of the members of CFA purchase, harvest and process timber from the National Forests in California and are dependent upon these forests as their sole or principal source of timber supply. In addition, some of CFA's members own timber land adjacent to or located within the boundaries of several of California's National Forests. CFA represents its members before Congress, the state legislature of California, and federal and state agencies that regulate the forest products industry and administer the environmental laws of the state of California and the Federal government as they pertain to the harvesting of timber on public and private land.

3. In addition to representing the economic interests of its members, CFA also seeks to enhance the quality of life for its members, their employees and the public, to protect the environment, and to improve fish and wildlife habitat. CFA members and their employees and families regularly use the National Forests for recreation and enjoyment as well as depend upon the timber from these forests for their livelihoods. CFA and its members also work to enhance public awareness and knowledge of the role of timber harvests in providing wildlife habitat and promoting productive and healthy forests. CFA and its members have participated extensively in the National Forest planning process in California (*i.e.*, Forest Service Region V), including preparation and submission of extensive comments and the filing of administrative appeals and the intervention in the appeals of other parties relating to draft and final National Forest plans, records of decision, and draft and final environmental impact statements issued by the

United States Forest Service pursuant to the National Forest Management Act and the National Environmental Policy Act.

4. Among the specific purposes set forth in the current By-Laws of the California Forestry Association, are: "to promote adequate and effective protection of all forest lands of the state of California from wildlife, from insects, pests and diseases affecting timber, and from significant amounts accelerated erosion, and to promote effective management of the growing and harvesting of a perpetual crop of timber for all timber lands of the State of California", "to collect and disseminate information to members on matters pertaining to the purchase of public timber", "to reserve regulatory problems affecting the wood products industry of California", and "to foster the management of public forests for maximum net public benefit".

5. CFA and its members submitted extensive comments on the draft and supplemental environmental impact statements issued by the United States Forest Service for Vegetation Management for Reforestation beginning as early as the 1983 draft environmental impact statement and continuing through the 1986 supplement to the 1983 DEIS and thereafter. CFA also intervened in plaintiffs' administrative appeal from the final environmental impact statement and record of decision for Vegetation Management for Reforestation issued by the United States Forest Service which is the subject matter of this action. *See* Final Decision of Forest Service, dated January 7, 1991, attached hereto as Exhibit 1. In addition, CFA and its members have attended numerous public meetings, and both formally and informally have been involved in the public planning process culminating in the final environmental impact statement and record of decision for the Vegetation Management for Reforestation.

6. Throughout CFA's extensive involvement in the public comment period and administrative appeal of the

final environmental impact statement and record of decision for Vegetation Management for Reforestation, it has demonstrated, both orally and in writing, an active concern for proper compliance by the United States Forest Service with the National Environmental Policy Act and its implementing regulations. In its capacity as a representative of its members and their employees, CFA believes that the proper execution and implementation of the National Environmental Policy Act and related environmental laws and regulations is imperative to the protection of the environment and the public and to the Forest Service's stewardship of the National Forests in California.

7. CFA is directly interested in and consistently works to support "the continuing policy of the Federal Government, in cooperation with . . . concerned public and private organizations . . . to create and maintain conditions under which man and nature can exist in producitve harmony and fulfill the social, economic and other requirements of present and future generations." National Environmental Policy Act at 42 U.S.C. § 4331.

8. CFA and its predecessor organizations have had primary responsibility for and/or have participated in a variety of activities indicating CFA's commitment to a better environment and the proper and effective administration of the National Environmental Policy Act, its implementing regulations and related environmental laws, including

(a) The Western Timber Association, a predecessor of CFA, was an important participant in developing Operation Phoenix, a multi-agency and industry effort to promote the prompt regeneration of forest land devastated by the disastrous California forest fire of 1987.

(b) The Western Timber Association, a predecessor of CFA, was primarily responsible for developing

the Alliance for Environment and Resources (AER), a statewide California grassroots group with numerous local chapters which work actively to promote sound environmental use and protection of a wide range of resources.

(c) CFA and its predecessor organizations have regularly been active in annual Arbor Day activities and in a wide variety of other specific events which promote the proper care and regeneration of forest land.

9. I am personally familiar with the complaint filed by the plaintiff organizations in this action (CIVS-91-217-DFL-PAN) and with the administrative appeals which preceded this action. In this action the plaintiffs allege that the United States Forest Service failed to comply with the National Environmental Policy Act in promulgating the programmatic final environmental impact statement and record of decision for Vegetation Management for Reforestation applicable to all National Forests in the state of California. Plaintiffs seek an injunction of unspecified duration against the use of herbicides (and pesticides) until the Forest Service has performed unspecified additional analyses and actions deemed necessary by plaintiffs for compliance with NEPA.

10. The interests of CFA in this litigation are directly threatened by the issues raised in plaintiffs' complaint and the relief sought. All of the National Forests in California are currently undergoing a planning process in which the harvest of public timber is to be harmoniously coordinated with other multiple uses on that National Forest for the next ten to fifteen years. Each of the resulting National Forest plans on its face contemplates the use of herbicides, as determined by local conditions, "where essential to achieve the resource management objectives of each plan including the timber volume available for harvesting each year. Final Environmental Impact Statement, Vegetation Management

for Reforestation, Vol. I, Summary at S5-6. If the injunctive relief sought by plaintiffs in this action is granted, these National Forests will be significantly impacted and the volume of timber available for public harvest from the California National Forests will significantly decline.

11. The significant decrease in timber supply from the National Forests resulting from the relief requested by plaintiffs in this action would severely impact members of CFA, its employees and their families not only through the closure of mills and subsequent unemployment but also because 25% of the receipts derived from this sale of timber from National Forests is returned directly to the counties of California in which those forests are located to be used for schools and roads. Further, CFA believes that if the total ban on the use of herbicides were imposed as advocated by plaintiffs, the resulting overemphasis on mechanical and other means of vegetation management would be substantially more injurious to public health and less environmentally desirable than a balanced approach incorporating herbicides and pesticides as may be appropriate in particular local circumstances.

12. CFA does not share all of the interests of the federal defendants in this action. In the first place, CFA's members have specific economic and future contractual interests in the sale of timber from the National Forests. Unless CFA is permitted to intervene in the instant action, these interests will not be directly represented. Secondly, as an active participant in the forest planning process for each of the National Forest plans under preparation in the state of California, CFA has a separate and distinct interest from that of defendant in the rapid finalization of those plans which are significantly dependent upon final adoption and implementation of the record of decision and final environmental impact statement for Vegetation Management for

Reforestation. Accordingly, from this different perspective CFA is likely to make a number of different arguments from those raised by the federal defendants. Finally, since many CFA members own private timber land adjacent to or within the boundaries of the National Forests within the State of California, the ultimate results of the instant action regarding the use of herbicide on National Forests may directly impact and could unduly restrict the use of herbicides by CFA members on their private lands. This provides yet a third and distinctly different interest from that of federal defendant's not represented in this action unless CFA is granted intervention.

WILLIAM N. DENNISON
President
California Forestry Association

Dated: May 24, 1991

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Civil No. 91-217-DFL-PAN

SALMON RIVER CONCERNED CITIZENS, CALIFORNIA COALITION FOR ALTERNATIVES TO PESTICIDES, INC., SAFE ALTERNATIVES FOR OUR FOREST ENVIRONMENT, INC., NORTHCOAST ENVIRONMENTAL CENTER, INC.,
Plaintiffs,

v.

DALE ROBERTSON, Chief Forester
UNITED STATES FOREST SERVICE,
UNITED STATES DEPARTMENT OF AGRICULTURE,
Defendant,

and

CALIFORNIA FORESTRY ASSOCIATION,
Defendant-Intervenor.

REPLY OF INTERVENOR-APPLICANT CALIFORNIA FORESTRY ASSOCIATION TO PLAINTIFFS' OPPOSITION TO MOTION TO INTERVENE

[Filed July 15, 1991]

Introduction

Plaintiffs' opposition to the California Forestry Association's ("CFA") motion to intervene rests essentially upon the contention that CFA asserts *only* an economic interest and does not have any interests among those intended to be protected by the National Environmental Policy Act (NEPA). In a self-righteous and arrogant

tone, plaintiffs imply that only they and other like-minded "public interest" organizations have a valid interest in seeing that NEPA is properly observed by federal agencies. Plaintiffs suggest sarcastically that "the association [CFA] would undoubtedly benefit from continued violation of NEPA, [but] an economic interest in prolonging illegal agency action should not—and does not—provide a basis for intervention under Rule 24." Plaintiffs' opposition at 2-3. Contrary to these gratuitous derogatory remarks, and as demonstrated in CFA's initial supporting papers and in this reply memorandum, CFA has well-established and sincere environmental, conservation and wildlife interests as well as an interest in promoting compliance with NEPA which is no less sincerely held nor any less important than the interest of plaintiffs. CFA is therefore entitled to intervene in this action.

ARGUMENT

I. Unlike Intervenor-Applicants In The *Portland Audubon* Case, CFA Asserts Several Independent And "Significantly Protectable Interests" Which Qualify For Intervention Of Right.

Plaintiffs' opposition relies substantially upon *Portland Audubon Society v. Hodel*, 866 F.2d 302 (9th Cir.), *cert. denied*, 109 S. Ct. 3229 (1989); however, the facts of the instant case are different in significant respects from those in *Portland Audubon* and the various interests asserted by CFA here are considerably broader than the strictly economic interest asserted by the intervenor-applicants in that case.[1]

[1] Although intervenor-applicant California Forestry Association primarily argues in this reply that the facts of this case are significantly different from those presented in *Portland Audubon Society v. Hodel*, 866 F.2d 302 (9th Cir.), *cert. denied*, 109 S. Ct. 3229 (1989), we submit, in the alternative, that the *Portland Audubon* case was wrongly decided. An intervenor-applicant asserting an interest in the balancing of economic concerns with environmental

In *Portland Audubon* several plaintiff environmental groups opposed the logging of old growth timber on timber sales offered by the Bureau of Land Management. The plaintiffs sought declaratory and injunctive relief based upon alleged violations of NEPA, 42 USC §§ 4321-4347 (1982), and various other statutes.

The Northwest Forest Resources Council, a timber industry trade association, and several individual timber companies were allowed to intervene as defendants with respect to certain of plaintiffs' claims but were denied intervention with respect to plaintiffs' NEPA claim. 866 F.2d at 308. The Ninth Circuit recognized that these intervenors satisfied three of the four prerequisites of intervention as of right.[2] The question before the Court was whether the intervenor-applicants satisfied the remaining "interest" requirement. The Court observed that "no one denies that they [the applicants] have an economic interest in insuring a continued supply of timber from BLM lands," but determined that "NEPA provides no protection for the purely economic interests that they [the applicants] assert." 866 F.2d at 308, 309. In short, in *Portland Audubon* the intervenor-applicants "*pointed to no 'protectable' interest justifying intervention as of right.*" 866 F.2d at 309 (emphasis added).

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concerns has asserted an "interest relating to the property or transaction which is the subject of the action" as required for intervention under Fed.R.Civ.P. 24 (a)(2). In the National Environmental Policy Act Congress has expressly endorsed the "continuing policy of the Federal Government, in cooperation with . . . concerned public and private organizations . . . to create and maintain conditions under which man and nature can exist in productive harmony and fulfill the social, *economic* and other requirements of present and future generations." 42 USC § 4331 (emphasis added).

[2] Those prerequisites include: (1) the applicants' motion was timely; (2) the applicants were so situated that without intervention the disposition of the action may, as a practical matter, impair or impede their ability to protect their interest; and (3) the applicants' interest was not adequately represented by the existing parties. 866 F.2d at 308.

The circumstances in this case are sharply different from those in *Portland Audubon*. Here the underlying issue involves the discretion of the United States Forest Service to use herbicides as one element of a comprehensive approach to promoting the regeneration of National Forests and to controlling pests and undergrowth that slow regeneration and otherwise threaten the general health of those forests. Unlike *Portland Audubon*, this case does not involve a dispute over whether or how logging by timber companies should take place but rather a dispute over how best to preserve and promote tree growth in the Nationalf Forests of California while serving the interests of wildlife and other environmental concerns. Unlike the intervenor-applicants in *Portland Audubon*, CFA has asserted several significant protectable noneconomic interests squarely within the contemplated protection of NEPA and virtually identical to the type of interests presumably asserted by plaintiffs.

CFA's By-Laws specifically direct the Association "to promote adequate and effective protection of all forest lands of the State of California" from the destructive effects of wildfire, insects, pests, diseases and soil erosion. Declaration of William Dennison submitted in support of CFA's initial memorandum at 4 (hereafter "Dennison Decl. ¶ ——"). CFA is also specifically directed "to foster the management of public forests for maximum net public benefit." Dennison Decl. ¶ 4 (citing CFA's By-Laws). These plainly stated purposes of the Association assert genuine environmental, conservation and wildlife interests central to NEPA which are not "purely economic interests". That CFA and its members may differ from plaintiffs and their members on how environmental, conservation and wildlife interests are best achieved certainly should not disqualify CFA from intervenor status in this lawsuit.

Mr. Dennison's uncontroverted declaration also documents CFA's past involvement in efforts to regenerate

National Forest land devastated by disastrous forest fires, in grass roots group efforts specifically aimed at promoting sound environmental use and the protection of a wide range of resources and in a variety of other activities expressly directed at preserving and improving the environment on and off National Forest lands. Dennison Decl. ¶¶ 7 and 8.

Plaintiffs have not and cannot claim in this action that CFA's established interests are "purely economic". To be sure, CFA has significant economic interests in the regeneration of the forests; however, CFA's members and its members' employees also utilize the National Forests for recreation and enjoyment to the same extent as the members and employees of the plaintiff organizations. CFA contends in this lawsuit that the Forest Service's proposed careful use of herbicides as part of an integrated approach to vegetation management is in complete compliance with NEPA and is necessary in order to achieve a regenerated and healthy forest environment. In this litigation, CFA further contends that if the total ban on the use of herbicides is imposed, as advocated by plaintiffs, the resulting overemphasis on mechanical and other means of vegetation management will be substantially more injurious to the public health and less environmentally desirable than the balanced approach incorporating herbicides as may be appropriate in particular local circumstances as proposed by the Forest Service. Dennison Decl. ¶ 11.

This case differs in another significant respect from the *Portland Audubon* case. The environmental impact statement associated with the Forest Service's vegetation management guidelines (the "EIS") which is the subject matter of this action is directly incorporated by reference in and constitutes an essential component of all National Forest Plans currently being developed by the Forest Service in California. Dennison Decl. ¶¶ 9 and 10. Each of these Plans (establishing the use of forest resources

for the next 10-15 years) has been developed through a public planning process combining the requirements of the National Forest Management Act (16 USC § 1601, *et seq.*) and NEPA. This public planning process has involved literally years of work, and CFA (or its predecesesor association) has been an active participant in this process from the earliest stages. Many of these plans are now at or near the final stage of completion and all reflect carefully planned timber volumes and forest management practices premised upon the selective use of herbicides based upon local conditions. CFA has strongly supported this approach throughout the forest planning process; however, if CFA is not granted intervenor status in this lawsuit and if the plaintiffs are awarded the injunctive relief which they seek, the use of herbicides contemplated in these National Forest Plans will be eliminated and CFA, as a practical matter, will never have an opportunity in any future administrative appeal or judicial review of these Forest Plans to contest this significant change.

Accordingly, the *Portland Audubon* case and the other cases cited by plaintiffs in their opposition to CFA's motion to intervene do not apply to the circumstances in this case. CFA has asserted significant interests which are not "purely economic" and which are legally protectable interests in the property or transaction which is the subject matter of this action. Fed.R.Civ.P. 24(a)(2).[3]

II. Intervenor-Applicant Has Satisfied the Other Criteria For Intervention As Of Right.

Plaintiffs contend that disposition of this action will not as a practical matter impair or impede CFA's ability to protect its interests. Plaintiffs' memorandum at 5-6.

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[3] The Court is also respectfully referred to CFA's discussion of its other interests which are not "purely economic" at pages 6-9 of its initial supporting memorandum.

As demonstrated above and in CFA's initial supporting memorandum, this is obviously untrue. In addition, as indicated above, if the implementation of the Forest Service's Vegetation Management for Reforestation guidelines are barred by this action, every National Forest Plan in California will be adversely effected, and plaintiff, as a practical matter, will not be able to litigate that action in the course of any future administrative appeals or judicial reviews of those National Forest Plans. Furthermore, if the relief sought by plaintiffs in this action is granted, the Forest Service will be unable to pursue forest regeneration efforts utilizing the appropriate and careful application of herbicides while protecting wildlife and other conservation concerns. CFA's interest in seeing that this goal is accomplished will be foreclosed.

Plaintiffs also concede, as they must, that only minimal showing is required for CFA to establish that its interests would not be represented adequately by the Government in this case. CFA has made such a showing. See CFA's initial supporting memorandum at 10-12.

III. CFA Has Shown That It Will Significantly Contribute To The Full Development Of The Issues Underlying This Action And To The Just And Equitable Adjudication Of The Legal Questions Presented And That Its Participation Will Cause No Undue Delay Or Prejudice To The Original Parties.

Pursuant to the Orders of this Court and the parties' Joint Status Report dated May 24, 1991, this case is proceeding to final resolution on cross-motions for summary judgment. To date no discovery has been sought nor is any contemplated by plaintiffs, defendant or CFA. In fact, at paragraph 6 of the Joint Status Report defendant has stated that it believes discovery is inappropriate and plaintiffs have stated that they do not contemplate extensive discovery, if any. Intervenor-applicant

CFA has agreed to abide by the schedules agreed to by plaintiff and defendant. Thus, if this case proceeds as plaintiff and defendant have projected, CFA's intervention will primarily afford it the right to participate in oral argument and to submit its own briefs. Given CFA's considerable economic and noneconomic interests in the subject matter of this action, permissive intervention, at a minimum, is appropriate in order to provide this Court with the assurance that all factual and legal issues will be fully ventilated consistent with the public involvement process contemplated under NEPA.

CONCLUSION

For each of the foregoing reasons and those stated in CFA's previous filings, CFA requests that it be granted leave to intervene as of right or, in the alternative, permissive intervention under Rule 24.

Respectfully submitted,

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July 15, 1991

Supreme Court, U.S
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No. 92-1424

In The

Supreme Court of the United States

October Term, 1992

CALIFORNIA FORESTRY ASSOCIATION,

Petitioner,

v.

SALMON RIVER CONCERNED CITIZENS, CALIFORNIA COALITION FOR ALTERNATIVES TO PESTICIDES, INC., SAFE ALTERNATIVES FOR OUR FOREST ENVIRONMENT, INC., NORTHCOAST ENVIRONMENTAL CENTER, INC.,

DALE ROBERTSON, CHIEF, UNITED STATES FOREST SERVICE, UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Should the Court review the Ninth Circuit's determination that the California Forestry Association (CFA) does not have an interest sufficient to intervene as a defendant in a suit seeking to compel a federal agency to comply with its obligations under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321-4370b?

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No. 92-1424

In The

Supreme Court of the United States

October Term, 1992

CALIFORNIA FORESTRY ASSOCIATION,

Petitioner,

v.

SALMON RIVER CONCERNED CITIZENS, CALIFORNIA COALITION FOR ALTERNATIVES TO PESTICIDES, INC., SAFE ALTERNATIVES FOR OUR FOREST ENVIRONMENT, INC., NORTHCOAST ENVIRONMENTAL CENTER, INC.,

DALE ROBERTSON, CHIEF, UNITED STATES FOREST SERVICE, UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

This case involves a challenge by several environmental organizations to an Environmental Impact Statement (EIS) prepared by Region V of the United States Forest Service (essentially all national forests in California), pursuant to the National Environmental Policy Act

(NEPA), 42 U.S.C. §§ 4321-4370b. Plaintiffs allege that the Forest Service failed to adequately consider the environmental impacts of a proposal to use chemical herbicides on national forests in Region V.

Petitioner California Forestry Association (hereinafter CFA or Petitioner) sought to intervene as a defendant pursuant to Federal Rule of Civil Procedure 24. The district court denied Petitioner's motion to intervene, but allowed Petitioner to participate in the briefing as amicus curiae. Petitioner appealed the denial of intervention to the Ninth Circuit, which affirmed the district court.[1] Petitioner then filed for a Writ of Certiorari in this Court.

SUMMARY OF THE ARGUMENT

This Court and the circuits of the United States Court of Appeals agree that an applicant for intervention as of right under FRCP 24(a) must show a legally protectable interest that will be affected by the litigation before intervention as of right will be allowed. Petitioner failed to make such a showing in this case, and the district court and Ninth Circuit properly denied intervention.

The purpose of FRCP 24(a) is to achieve judicial economy by allowing related issues to be resolved in a single lawsuit. Since Petitioner does not seek to protect a legally recognized interest under NEPA, and since there

[1] While the appeal of the denial of intervention was pending, the district court ruled in favor of defendant Forest Service on the merits. Plaintiffs appealed that ruling. The appeal has been briefed but not argued.

are no other issues related to this case that Petitioner might raise in a subsequent lawsuit, allowing intervention would needlessly impose additional burdens on the court and parties in this case – a result contrary to the purpose of FRCP 24(a).

REASONS FOR DENYING THE WRIT OF CERTIORARI

The Petitioner's request for a Writ of Certiorari should be denied because nothing about the case makes review by this Court appropriate. There is neither disagreement among the circuits nor disagreement between the circuits and this Court with respect to the appropriate test for intervention as of right under FRCP 24(a). Nothing in the opinions of the district court or the Ninth Circuit decides any important question of federal law that would warrant review by this Court.

I. THE NINTH CIRCUIT CORRECTLY AFFIRMED THE DISTRICT COURT'S DENIAL OF PETITIONER'S MOTION FOR INTERVENTION OF RIGHT UNDER FRCP 24(a)(2)

The Ninth Circuit correctly affirmed the district court's denial of Petitioner's motion to intervene as of right under FRCP 24(a) in this case. FRCP 24(a)(2) provides that a party may intervene as of right in pending litigation if it is able to show "an interest relating to the property or transaction which is the subject of the action and [it] is so situated that the disposition of the action may as a practical matter impair or impede [its] ability to

protect that interest, unless the . . . interest is adequately represented by existing parties."

There is no conflict among the circuits of the United States Court of Appeals concerning the availability of intervention of right under FRCP 24(a)(2) in actions brought to enforce federal agency compliance with NEPA. The circuits, including the Ninth Circuit in this case, are correctly applying the standard set by this Court in *Donaldson v. United States*, 400 U.S. 517 (1971) and followed in *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310 (1985) and *Diamond v. Charles*, 476 U.S. 54 (1986). Both the district court and Ninth Circuit properly applied this standard to determine that Petitioner failed to demonstrate a legally protectable "interest relating to the property or transaction" in this case. No circuit has allowed intervention of right under FRCP 24(a)(2) to a party seeking to intervene in support of a federal agency in a NEPA action in the absence of threatened contract or license. Petitioner has no such contract or license in this action.

A. The Circuits are Correctly Applying the Standard Set by This Court Concerning Intervention of Right Under FRCP 24(a)(2)

Petitioner claims that this Court has "given very little guidance to date on how interest is to be defined," and asserts that the Court has given "at best, only partial and mixed guidance as to what sort of interest qualifies under Rule 24(a)(2)." Petitioner's Brief at 9-10. Petitioner is simply wrong. The Court has provided clear, unambiguous guidance that has been applied consistently by the circuits.

In *Donaldson v. United States*, 400 U.S. 517, 531 (1971), the Court stated that an employee's asserted interest in an IRS proceeding with an employer was

> nothing more than a desire by the [applicant]. . . . This interest cannot be the kind contemplated by Rule 24(a)(2) when it speaks in general terms of 'an interest relating to the property or transaction which is the subject of the action.' What is obviously meant there is a significantly protectable interest.[2]

In *Diamond v. Charles*, 476 U.S. 54, 75 (1986), the Court explained that

> *Donaldson's* requirement of a "significantly protectable interest" calls for a direct and concrete interest *that is accorded some degree of legal protection. See Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 315 (1985) (noting that *Donaldson* "held that the employee's interest was not *legally protectable* and affirmed the denial of the employee's motions for intervention.")

(emphasis added).[3]

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[2] In *Donaldson*, the IRS had issued to an employer a summons under 26 U.S.C § 7602, seeking records prepared by the employer that would be relevant to an investigation of the tax liability of an employee. The employee sought intervention under FRCP 24(a)(2) in order to oppose enforcement.

[3] In *Diamond*, a doctor, who had a general desire to defend a state statute imposing criminal liability for the performance of an abortion under certain circumstances, was denied intervention by this Court because he lacked any "judicially cognizable interest in the statute's defense" and "the abstract interests advanced by Diamond . . . f[e]ll well outside the ambit of Rule 24(a)(2)." 476 U.S. at 65, 75.

The mere possibility that a lawsuit might have an impact on some interest of an applicant for intervention is insufficient to compel intervention as of right. Rather, in *Donaldson*, *Tiffany*, and *Diamond*, this Court clearly stated that a party will meet the "interest" test for intervention of right under Rule 24(a)(2) only when a legally protectable interest is affected. Petitioner has failed to demonstrate a legally protectable interest in this litigation. As we explain in part II of this brief, *infra*, Petitioner's allegations of generalized economic harm do not bring it within the zone of interests protected by NEPA. Its allegations of environmental interest are actually based on its economic interests, and in any event are not connected with the relief it seeks. And its members have no existing contract or license agreement that would be affected by the case. The Ninth Circuit applied *Donaldson* correctly in determining that Petitioner failed to allege a legally protectable interest that would support intervention.

B. There is No Conflict Between the Circuits Concerning the Availability of Intervention of Right Under FRCP 24(a)(2) in Actions Brought to Enforce Federal Agency Compliance With NEPA

Petitioner claims that decisions of the Seventh and Ninth Circuits (including the decision of the Ninth Circuit in this case) "are in direct conflict" with a decision of the Tenth Circuit. Petitioner's Brief at 7. Petitioner also claims that there is a conflict between opinions of various panels within the Ninth Circuit. *Id*. There is no such conflict however, either between circuits or within the Ninth Circuit.

Petitioner argues that in *Portland Audubon Society v. Hodel*, 866 F.2d 302 (9th Cir. 1989), in the instant case, and in *Wade v. Goldschmidt*, 673 F.2d 182 (7th Cir. 1982), the Ninth and Seventh Circuits "have held that economic interests alone, however substantial they may be, can never satisfy the interest requirement necessary to qualify for intervention of right under FRCP 24(a)(2)." Petitioner's Brief at 8. Petitioner then argues that in *Natural Resources Defense Council v. U.S. Nuclear Regulatory Comm'n*, 578 F.2d 1341 (10th Cir. 1978) and *County of Fresno v. Andrus*, 622 F.2d 436 (9th Cir. 1980), the Tenth and Ninth Circuits have "permitted intervention of right under Rule 24(a)(2) to business entities claiming only economic interests." Petitioner's Brief at 8. But in *Natural Resources Defense Council*, the applicants for intervention had legally protectable interests – licenses to mine uranium – that were threatened by the challenged proceeding. *No* circuit has granted a party asserting abstract economic interests intervention of right as a defendant in an action seeking to compel a federal agency to comply with NEPA in the *absence* of a threat to a contractual or legally protectable right.[4]

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[4] Petitioner argues that the Ninth Circuit's opinion in *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980), is in conflict with the Ninth Circuit opinion in *Portland Audubon Society v. Hodel*, 866 F.2d 302 (9th Cir. 1989) and in the instant case. *See* Petitioner's brief at 7. This Court, however, does not sit to review purported conflicts between different panels of a single circuit. *En banc* review is the appropriate remedy for claims of intra-circuit conflicts.

The Ninth Circuit in *Portland Audubon Society v. Hodel, supra,* required applicants for intervention to demonstrate that litigation in which applicants seek to intervene will "affect a statute or regulation governing applicant's interest" or will "directly alter *contractual* or other *legally protectable rights* of the proposed intervenors." *Portland Audubon,* 866 F.2d at 309 (emphasis added). *See also Westlands Water District v. United States,* 700 F.2d 561, 563 (9th Cir. 1983) (intervenors must identify a "legally protectable interest"). This correctly applies this Court's opinions in *Donaldson, Tiffany,* and *Diamond, supra.* The Ninth Circuit also recognized that in NEPA cases:

> [T]he only focus that the ongoing litigation- . . . can have is whether the governmental bodies charged with compliance, defendants, have satisfied the federal administrative decisions regarding the construction which would directly affect plaintiff's property. In a suit such as this, brought to require compliance with federal statutes regulating governmental projects, the governmental bodies charged with compliance can be the only defendants. As to the determination involved in this suit, all other entities have no right to intervene as defendants.

Portland Audubon, 866 F.2d at 309 (quoting *Wade v. Goldschmidt,* 673 F.2d 182, 184-85 (7th Cir. 1982)). *Portland* did not involve a proposed intervenors' contractual or license rights, and the instant case does not involve such rights.

The Seventh Circuit is also correctly applying this Court's intervention jurisprudence. In *Wade v. Goldschmidt, supra,* the Seventh Circuit denied applicant's

attempts to intervene as a defendant in a NEPA case because "[t]he holding in the instant case will not affect a statute or regulation governing the applicants' actions, nor will it directly alter contractual or other legally protectable rights of the proposed intervenor." *Wade*, 673 F.2d at 186, n. 6.[5]

Petitioner argues that the Tenth Circuit's grant of intervention in *Natural Resource Defense Council v. United States*, 578 F.2d 1341 (10th Cir. 1978) conflicts with the opinions in *Portland Audubon*, *Wade*, and the instant case. In *NRDC*, plaintiff sought to enjoin the Nuclear Regulatory Commission from issuing a license to operate a uranium mill. The court granted a motion by other license applicants and potential applicants to intervene, finding "that the interests of movants in the subject matter is sufficient to satisfy the requirements of Rule 24(a)(2) and that the threat of loss of their interest and inability to participate is of such magnitude as to impair their ability to advance their interest." 578 F.2d at 1343. The Tenth Circuit stated in *NRDC* that "[a] decision in favor of the plaintiffs, which is not unlikely, could have a profound effect on [applicant]. Hence, [applicant] does have an interest within the meaning of Rule 24(a)(2)." 578

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[5] *See also United States v. 39.96 Acres of Land*, 754 F.2d 855 (7th Cir. 1985), *cert denied*, 476 U.S. 1108 (1986) (citizens' group sought to intervene in a condemnation action – brought pursuant to the Indian Dunes National Lakeshore Act – court found that the statute did not create a legally protectable interest in the applicant, and therefore denied intervention). *Id.* 754 F.2d at 858.

F.2d at 1344. Although not emphasized in the court's opinion, the "interest" that would have been affected was the ability to obtain licenses to develop mining claims – a legally protectable interest. No such interest is involved in the instant case, or in the other cases relied upon by Petitioner to show a "conflict" among the circuits.

II. INTERVENTION IN THIS CASE WOULD BE INCONSISTENT WITH THE POLICIES BEHIND FEDERAL RULE OF CIVIL PROCEDURE 24 (a)(2)

FRCP 24 is primarily concerned with the efficient allocation of scarce judicial resources.[6] As the First Circuit stated in *Pujol v. Shearson/American Express Inc.*, 877 F.2d 132, 134 (1st Cir. 1989), FRCP 24 aims "to achieve judicial economies of scale by resolving related issues in a single lawsuit," while at the same time preventing "the single lawsuit from becoming fruitlessly complex or unending." (quoting *Smuck v. Hobson*, 408 F.2d 175, 179

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[6] The current FRCP 24(a)(2) is a product of the amendments of 1966. According to the Notes of the Advisory Committee, the rationale behind FRCP 24(a)(2) coincides with the rationale behind FRCP 19 (joinder), also amended in 1966. The Notes of the Advisory Committee indicate that after 1966, FRCP 19 implicates a theretofore unarticulated interest: "that of the public in avoiding repeated lawsuits on the same essential subject matter." 28 U.S.C. app. – Rules of Civil Procedure, Rule 24 (Notes of Advisory Committee on Rules – 1966 Amendments). The Fifth Circuit recognized this interplay in *Atlantis Development Corporation v. United States*, 379 F.2d 818, 825 (5th Cir. 1967), noting the "deliberate efforts to dovetail FRCP 19, 24, and 23 together. . . ."

(D.C. Cir. 1969)). *See also* Friedenthal, Kane & Miller, *Civil Procedure* 336 (1985) ("The basic objective underlying all claim and party joinder rules is rendering complete justice with as little litigation as possible."). Granting Petitioner intervention as a defendant on the side of the government in this NEPA case would undermine the purposes of FRCP 24. Intervention would not promote judicial economy because Petitioner asserts no rights or obligations under NEPA that could be litigated in a subsequent or concurrent lawsuit. And allowing Petitioner to intervene, with full rights to conduct discovery, initiate motions, cross-examine witnesses, and participate in oral argument, would multiply the time and resources necessary to resolve the case, with no corresponding benefits.

A. Granting Intervention To A Party Unable To Maintain Its Own Claim Would Not Promote Judicial Economy

Petitioner contends that if its petition for intervention is denied, it "will be compelled to bring an action of [its] own at a later date" to defend its interests. Petitioner's brief at 17. Petitioner does not elaborate, however, on who it would sue, or what the action would involve. It is difficult to imagine why an applicant for intervention to *defend* an EIS would later initiate its own NEPA suit to challenge the same EIS.[8] Petitioner could not sue the

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[8] Although some NEPA cases have involved intervenor-defendants, in those cases intervention apparently was not contested. *See Lujan v National Wildlife Federation*, 497 U.S. 871 (1990) (plaintiff did not have standing under NEPA.); *Kleppe v. Sierra Club*, 427 U.S. 390 (1976) (issue in contention was not an

Forest Service over the EIS at issue in this case even if it wanted to, because Petitioner asserts no interest that is within the zone of interests protected by NEPA. And Petitioner cannot sue *plaintiffs*, because plaintiffs did not write the EIS and have no affirmative obligations under NEPA. Allowing Petitioner to intervene would therefore increase, rather than decrease, the total judicial resources necessary to resolve the issues in this case.

Petitioner will not "bring an action of its own" to challenge the EIS at issue in this case, because it seeks to *defend* the EIS. *See* Petitioner's brief at 4. Petitioner has never suggested that the Forest Service is guilty of illegal conduct. Intervention as a defendant cannot reduce potential future lawsuits if the only *potential* defendant in any future suit challenging the EIS (in this case the Forest Service) is already named as a defendant.[9]

"agency action" subject to NEPA.); *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973) and *Flint Ridge Development Co. v. Scenic Rivers Association of Oklahoma*, 426 U.S. 776 (1976), *reh. den.* 429 U.S. 875 (1976) (NEPA superseded by another statute); *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980) and *Kleppe v. Sierra Club*, 427 U.S. 390 (1976) (court would not interfere with discretionary agency action).

[9] If Petitioner's threat of a future lawsuit envisions suing *plaintiffs*, Petitioner should at least be required to reveal the basis of such a suit. Since NEPA is directed only at federal agencies, and not the private sector, Petitioner could not sue plaintiffs for violating NEPA. And although Petitioner alleges potential injury stemming from the injunction which plaintiffs seek in this lawsuit, an order directing an agency to comply with the law can hardly be a basis for a claim against the party who obtained the order.

1. Petitioner Lacks Standing To Initiate Its Own NEPA Suit

Even if Petitioner wanted to challenge the EIS that it seeks to defend in this case, it would not have standing to initiate such a lawsuit, because the abstract economic interests it asserts are not within the scope of interests protected by NEPA.[9] *See Port of Astoria v. Hodel*, 595 F.2d 467, 475 (9th Cir. 1979) (strictly financial losses "are outside of NEPA's zone of interests and are not sufficient to establish standing"); *Churchill Truck Lines, Inc. v. United States*, 533 F.2d 411, 416 (8th Cir. 1976) (common carriers lacked standing to raise NEPA challenge to permit issued by ICC to competing carrier); *Cross-Sound Ferry Services, Inc. v. Interstate Commerce Commission*, 934 F.2d 327, 339 (D.C. Cir. 1991) (injury to party's "fiscal health" was

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[9] In *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-51 (1989), this Court stated that NEPA

> ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; [it] also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decision making process and the implementation of that process. . . . Although these procedures are almost certain to affect the agencies substantive decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.

The only remedy available under NEPA, therefore, is to compel agency compliance through the preparation of an adequate EIS. Petitioner does not claim that a new EIS is required.

insufficient for NEPA standing) (Thomas, J., concurring, citing *Churchill*).[10]

This Court discussed the importance of independent standing for intervenors in a related context in *Diamond v. Charles*, 476 U.S. 54, 68-69 (1986). In *Diamond*, a unanimous Court refused to allow a party lacking standing to pursue an appeal as an intervenor:

> [S]tatus as an intervenor below . . . does not confer standing sufficient to keep the case alive in the absence of [a party with standing] on this appeal. Although intervenors are considered parties entitled, among other things, to seek review by this Court . . . , an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that [it] fulfills the requirements of Article III.

Id. at 68. Although it is not clear whether the standing of intervenors was addressed below in *Diamond*, once the intervenors became the sole parties, the Court plainly

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[10] Petitioner also asserts that it has non-economic interests in the use of the forest for enjoyment and recreation, and that these interests support intervention. Petitioner does not explain, however, how these interests are threatened by this litigation or how those interests would be furthered by intervening as a defendant. Plaintiffs seek compliance with NEPA, a result that is consistent with, not adverse to, the interests asserted by Petitioner. In any event, the district court correctly found that Petitioner's purported non-economic interests are "intertwined with [Petitioner's] economic interests," and "further [Petitioner's] broader goal of ensuring a stable and continuing supply of timber for its timber-dependent member communities." Petition for Certiorari, Appendix B, at 7a.

required that the intervenors show an interest sufficient to support standing before being allowed to proceed.

A number of circuits have found, consistent with *Diamond*, that applicants for intervention must demonstrate independent standing or at least some right to maintain a claim of their own. In *Cook v. Boorstin*, 763 F.2d 1462, 1470 (D.C. Cir. 1985), for example, the court stated that "an intervenor of right, just like an ordinary plaintiff, must have standing." *See also Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir. 1985) (intervenor must be able to maintain a claim for relief sought); *Solien v. Miscellaneous Drivers & Helpers Union, Local No. 610*, 440 F.2d 124, 132 (8th Cir. 1971), *cert. denied.*, 403 U.S. 905 (1971) (intervention presupposes a right to maintain a claim).

Since Petitioner's lack of standing precludes it from bringing a subsequent or concurrent lawsuit based on this EIS, allowing Petitioner to intervene would contravene FRCP 24(a)(2)'s goal of conserving judicial resources by consolidating potential litigation involving the same issues.

2. Petitioner's Alleged Non-NEPA Interests Are Not Legally Protectable In This Litigation

Petitioner argues that even if its interests are not protected by NEPA, its "interests are unquestionably among those which Congress sought to protect in enacting [the National Forest Management Act (NFMA), 16 U.S.C. § 1601 et seq., the Multiple Use Sustained Yield Act, 16 U.S.C. §§ 528-31, and the Forest Service's Organic Act, 16 U.S.C. § 475.]" Petitioner's Brief at 23, and that its

"property or transaction" interest is an interest in "actual utilization of forest resources." Petitioner's brief at 16.

Petitioner consists of approximately 82 forest products companies who depend upon timber from the national forests in California. Petitioner's president Mr. Dennison stated:

> Among the specific purposes set forth in the current By-Laws of the California Forestry Association, are: "to promote adequate and effective protection of all forest lands of the State of California from wildfire, from insects, pests and diseases affecting timber, and from significant amount [sic] accelerated erosion, and to promote effective management of the growing and harvesting of a perpetual crop of timber for all timber lands of the State of California," "to collect and disseminate information to members on matters pertaining to the purchase of public timber," "to resolve regulatory problems affecting the wood products industry of California, and to foster the management of public forests for maximum net public benefit."

ER at 13.[12] Petition for Certiorari, Appendix A, at 4a; Appendix B at 7a. Petitioner undoubtedly has an interest

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[12] Petitioner claims the injunction sought by plaintiffs would effectuate a "total ban on the use of herbicides." Declaration of William N. Dennison, ER at 16-17. As a factual matter Plaintiffs are not asking for a ban on the use of herbicides; such a substantive remedy is not available under NEPA. Plaintiffs seek only to compel the Forest Service to comply with the procedural requirements of NEPA. And no interest of Petitioner under *NEPA* would be affected by an order directing preparation of a better EIS. NEPA does not create a cause of action against a government agency because it was overzealous in

in the "actual utilization of forest resources," and it *may* even be that those interests are protected by one or more statutes. But the only statute at issue in this case is NEPA, and the only question in this case is whether the Forest Service complied with NEPA, Petitioner must demonstrate an interest "relating to . . . the subject of the action." FRCP 24(a). Petitioner's interests under other statutes, and in the "utilization of forest resources," are not related to *this* action.

B. Allowing Petitioner to Intervene of Right Would Increase the Complexity of This Action, With No Corresponding Benefit

If Petitioner were allowed to intervene it would have full rights to conduct discovery, file motions, cross-examine witnesses, and generally increase the workload of the court and existing parties. Petitioner's briefing of extraneous statutes not at issue in this case illustrates how additional parties inevitably multiply the resources necessary to decide a case. As the Ninth Circuit noted, Petitioner's interest in the proper interpretation of NEPA supports intervention as of right, FRCP 24(a) would allow virtually anyone to intervene in virtually any NEPA action.[12] Petition for Certiorari, Appendix A, at 3a. *See*

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studying the potential environmental consequences of a proposed project. NEPA's purpose is to compel, not to limit, the study of environmental consequences.

[12] According to the EIS, 380 contributors submitted comments on the draft EIS. CR item 17 (administrative record, part 3 of 3 (EIS)); EIS Volume IV-Appendix 1. If Petitioner were allowed to use its "prior involvement in the development of the

e.g., State ex rel. Van de Kamp v. Tahoe Regional Planning Agency, 792 F.2d 779, 781-82 (9th Cir. 1986) ("[T]o the extent the [proposed intervenor] had an interest in water exportation, it was a general interest . . . shared by a substantial portion of the population of Northern California, rather than an interest in the . . . subject litigation. They accordingly had no right to intervene.") (quoting *Westlands Water District, supra*, 700 F.2d at 563). *See also Dilks v. Aloha Airlines, Inc.*, 642 F.2d 1155, 1157 (9th Cir. 1981) ("general concern" for the "proper interpretation" of laws not sufficient to support intervention). Such a result is inconsistent with FRCP 24(a)'s goal of conserving scarce judicial resources.

VMR policy" as a bootstrap to create an interest in the litigation, there is no logical reason why the other 379 contributors should not be granted intervention on that basis as well.

CONCLUSION

Nothing about this case warrants a Writ of Certiorari. There is no conflict among the circuits, and the order denying intervention but allowing participation as amicus parties raises no significant issues of federal law. Petitioner's request for Writ of Certiorari should be denied.

Respectfully submitted,

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SALMON RIVER CONCERNED CITIZENS, CALIFORNIA COALITION FOR ALTERNATIVES TO PESTICIDES, INC., SAFE ALTERNATIVES FOR OUR FOREST ENVIRONMENT, INC., NORTHCOAST ENVIRONMENTAL CENTER, INC.,

DALE ROBERTSON, CHIEF, UNITED STATES FOREST SERVICE, UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 92-1424

In The

Supreme Court of the United States

October Term, 1992

CALIFORNIA FORESTRY ASSOCIATION,

Petitioner,

v.

SALMON RIVER CONCERNED CITIZENS, CALIFORNIA COALITION FOR ALTERNATIVES TO PESTICIDES, INC., SAFE ALTERNATIVES FOR OUR FOREST ENVIRONMENT, INC., NORTHCOAST ENVIRONMENTAL CENTER, INC.,

DALE ROBERTSON, CHIEF, UNITED STATES FOREST SERVICE, UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

This reply brief addresses two arguments first raised by respondents in their Opposition to Petition for A Writ of Certiorari ("Opposition"). First, respondents assert that there is no conflict between the Ninth and Seventh Circuits and the Tenth Circuit regarding the specific interests necessary to satisfy the interest requirement of Fed. R. Civ. P. 24(a)(2). According to respondents, the quality of the legally protectable interests of the intervenor-applicants in *Natural*

Resources Defense Council v. U.S. Nuclear Regulatory Commission, 578 F.2d 1341 (10th Cir. 1978) ("*NRDC*"), is concrete and specific, unlike the "abstract economic interests" of petitioner California Forestry Association ("CFA"). Opposition at 7. Respondents conclude therefore that *NRDC* is consistent with the opinions of the Ninth and Seventh Circuits and argue that CFA does not have the type of economic interest that even the Tenth Circuit recognizes as sufficient to support intervention of right. *Id.* Second, respondents argue that CFA is not entitled to intervention of right because CFA "lacks standing to initiate its own NEPA suit." Opposition at 13. Both arguments are without merit and are based upon misunderstandings of the facts and the objective of Rule 24 "to achieve judicial economies of scale by resolving related issues in a single lawsuit." Opposition at 10.

I. BECAUSE THE ECONOMIC INTERESTS OF THE INTERVENOR-APPLICANTS IN BOTH THE TENTH CIRCUIT'S DECISION IN *NRDC* AND THE NINTH CIRCUIT'S DECISION BELOW ARE VIRTUALLY IDENTICAL, THESE DECISIONS, WHICH HAVE OPPOSITE HOLDINGS, ARE IN DIRECT CONFLICT.

Respondents initially argue that in *NRDC*, "the applicants for intervention had legally protected interests – licenses to mine uranium – that were threatened by the challenged proceeding." Opposition at 7. However, respondents subsequently contradict this statement when they acknowledge correctly that the intervenor-applicants in *NRDC* included both "*license applicants and potential applicants*". Opposition at 9 (emphasis added). In *NRDC* the intervenor-applicants were the Kerr-McGee Nuclear Corporation, a potential recipient of a license under the procedure at issue, and the American Mining Congress, an organization representing mining companies. 578 F.2d at 1342, 1346. The Tenth Circuit reasoned that

> the interest asserted on behalf of Kerr-McGee and the American Mining Congress is one which is a genuine threat to Kerr-McGee and the members of

> the American Mining Congress to a substantial degree.

578 F.2d at 1344-45. Thus, in finding that the interests of the intervenor-applicants before it were not merely "general and somewhat abstract" like those unsuccessfully asserted by intervenor-applicants in *Allard v. Frizzell*, 536 F.2d 1332, 1334 n.1 (10th Cir. 1976), the Tenth Circuit concluded that the quality of the interests of the intervenor-applicants before it was direct, specific and entitled to the status of a legally protectable interest.

The record in this case demonstrates that CFA, like Kerr-McGee Nuclear Corporation and the American Mining Congress, has asserted legally protectable interests. CFA represents eighty-two forest products businesses and affiliated member companies many of whom purchase, harvest and process timber from the national forests in California (*i.e.*, Region 5 of the United States Forest Service) pursuant to federal timber sale contracts and are dependent upon these forests as their sole or principal source of timber supply. *See* uncontroverted Declaration of William N. Dennison, included in the Excerpts of Record at E-10-18. As a result, CFA's members and their employees depend upon timber from the national forests of California for their livelihood. *Id.* The use of herbicides to promote tree growth, which is the subject of the EIS at issue in this case, directly affects the amount of timber that would be available to CFA's members through federal timber sales. Therefore, CFA's interests are virtually identical to those of the intervenor-applicants in *NRDC*.

The Ninth and Seventh Circuits have unequivocally held that economic interests alone – regardless of the specificity – can *never* justify intervention of right in a NEPA compliance action. *Portland Audubon Society v. Hodel*, 866 F.2d 302 (9th Cir. 1989), *cert. denied*, 402 U.S. 911 (1989); *Wade v. Goldschmidt*, 673 F.2d 182 (7th Cir. 1982). However, respondents have not denied and cannot deny that the interests of the intervenor-applicants in *NRDC*, which are virtually identical to CFA's and which the Tenth Circuit held justified intervention under Rule 24, are fundamentally economic in nature. There is a clear and direct conflict between the holdings of

the Tenth Circuit and the holdings of the Seventh Circuit and the Ninth Circuit on the issue before this Court.

II. AS A DEFENDANT INTERVENOR-APPLICANT IN THIS CASE, CFA NEED NOT DEMONSTRATE STANDING TO BRING ITS OWN NEPA COMPLIANCE ACTION IN ORDER TO INTERVENE AS A MATTER OF RIGHT.

Respondents argue that because CFA allegedly lacks standing to initiate its own NEPA compliance action, allowing CFA "to intervene would contravene FRCP 24(a)(2)'s goal of conserving judicial resources by consolidating potential litigation involving the same issues." Opposition at 15. This argument confuses the concept of standing as a threshold requirement, applicable only to plaintiffs or appellants and which must be met by a plaintiff or appellant to initiate an action, with the concept of standing as a continuing requirement applicable to both parties insofar as neither can continue in the action unless a genuine case or controversy exists which would justify the continuing jurisdiction of the federal court. Respondents would have this Court adopt an unduly narrow interpretation of Rule 24 which does not promote judicial economy and which would encourage additional related litigation over issues best resolved in a single lawsuit "involving as many apparently concerned persons as is compatible with efficiency and due process." *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967).[1]

Standing is a concept applicable directly only to plaintiffs or appellants. Article III of the Constitution requires that a party bringing suit establish the existence of a real case or controversy as a threshold requirement for access to the federal courts. *See Lujan v. Defenders of Wildlife*, 60 U.S.L.W. 4495 (U.S. June 12, 1992). However, Rule 24(a)(2) by its very nature presupposes an existing lawsuit in which a

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[1] CFA supports the EIS at issue in its present form, and opposes respondents' contentions that the EIS should address additional matters. Were the respondents' action to result in a new EIS being issued consistent with their contentions, CFA would initiate additional litigation contesting the EIS.

plaintiff has already established the existence of a real case or controversy under Article III. Rule 24(a)(2) addresses the requirements for intervention of right by defendant as well as plaintiff intervenor-applicants.

The requirements for intervention of right are set forth explicitly in the rule:

> Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a)(2). The plain language of Rule 24(a)(2) does not require that an intervenor-applicant establish standing for its interest independent of the case-or-controversy requirement of Article III, presumably already satisfied by the original parties to the action. Carried to its logical extreme, respondents' interpretation of Rule 24(a)(2) would restrict intervention of right to plaintiff intervenor-applicants in all cases on the ground that only plaintiff intervenor-applicants can establish standing to maintain a lawsuit. This is clearly not the intent of Rule 24 (a)(2).

Respondents concede that "some NEPA cases have involved intervenor-defendants" where the record allegedly remains unclear as to whether intervention was contested. Opposition at 11 n.8. However, respondents omit any discussion of *Trbovich v. United Mine Workers of America*, 404 U.S. 528 (1972), a case not involving NEPA in which intervention under Rule 24(a)(2) was contested and upheld by this Court even though the intervenor-applicant could not have brought his own suit. *Trbovich* addressed the question of whether a union official who was precluded by the Labor-Management Reporting and Disclosure Act from bringing a suit against the union had the right to intervene in the suit brought by the Secretary of Labor to enforce the statute. Significantly, the Act granted the Secretary of Labor the exclusive authority to

remedy violations of the union election procedures. 404 U.S. at 531.

The union official sought to intervene on the side of the government under Rule 24(a) in order to urge additional grounds for setting aside the election, to seek certain safeguards with respect to any new election and to present evidence and argument in support of the Secretary's challenge. 404 U.S. at 530. Despite the fact that the Act placed the responsibility for enforcement solely upon the government, the Supreme Court endorsed the union official's right to intervene under Rule 24(a)(2). Similarly here, the fact that NEPA places the obligation for compliance upon the United States cannot be read in light of *Trbovich* as precluding intervention by non-governmental parties as defendants in NEPA litigation.

In their discussion of the precedents of this Court, respondents correctly note that in *Diamond v. Charles*, 476 U.S. 54, 68-69 (1986), the Court held that in the special case where an intervenor seeks to pursue an appeal independent of one or more of the original parties to the action, the intervenor must establish that it fulfills the requirements of Article III. However, respondents omit any reference to this Court's specific reservation in *Diamond* that "[w]e need not decide today whether a party seeking to intervene before a District Court must satisfy not only the requirements of Rule 24(a)(2) but also the requirements of Art. III." 476 U.S. at 69.

In *Diamond* the Court noted that "the precise relationship between the interest required to satisfy [Rule 24(a)(2)] and the interest required to confer standing has led to anomalous decisions in the Courts of Appeals." 476 U.S. at 68. However, a substantial number of circuits, including the Ninth Circuit, have expressly declined to impose an independent standing requirement upon intervenor-applicants. In *Portland Audubon Society v. Hodel*, 866 F.2d 302 (9th Cir.), *cert. denied*, 492 U.S. 911 (1989), the Ninth Circuit declined to "incorporate an independent standing inquiry into our circuit's intervention test." *Id.* at 308 n.1. Likewise, the Eleventh Circuit has expressly rejected the independent standing requirement for

intervention: "We therefore hold that a party seeking to intervene need not demonstrate that he has standing in addition to meeting the requirements of Rule 24 as long as there exists a justiciable case and controversy between the parties already in a lawsuit." *Chiles v. Thornburg*, 865 F.2d 1197, 1213 (11th Cir. 1989).

Respondents' position also has been rejected, either explicitly or implicitly, by the Second, Sixth, and Eighth Circuits, and by district courts in New York and Massachusetts. *See Purnell v. City of Akron*, 925 F.2d 941, 948 (6th Cir. 1991) ("[a] party seeking to intervene need not possess the standing necessary to initiate a lawsuit"); *United States Postal Service v. Brennan*, 579 F.2d 188, 190 (2d Cir. 1978) ("[t]he existence of a case or controversy having been established as between the Postal Service and the Brennans, there was no need to impose the standing requirements upon the proposed intervenor"); *Planned Parenthood of Minnesota, Inc. v. Citizens for Community Action*, 558 F.2d 861 (8th Cir. 1977) (issue of intervention resolved without reference to standing); *Authors League of America, Inc. v. Ass'n of American Publishers*, 619 F. Supp. 798, 806 (S.D.N.Y. 1985) ("[i]f a plaintiff establishes standing, the plaintiff-intervenor need not demonstrate an independent basis for standing to assert its representative claims"), *aff'd on other grounds sub nom. Authors League of America, Inc. v. Oman*, 790 F.2d 220 (2d Cir. 1986); *Avery v. Heckler*, 584 F. Supp. 312, 316 n.3. (D. Mass. 1984) ("[a]n intervenor need not have the standing necessary to initiate the lawsuit"), *aff'd on other grounds sub nom. Avery v. Secretary of Health and Human Services*, 762 F.2d 158 (1st Cir. 1985).

While respondents assert that some other circuits have adopted the independent standing test, a closer reading of the decisions cited by respondents demonstrates no wholesale incorporation of a standing requirement in intervention cases. For example, *Cook v. Boorstin*, 763 F.2d 1462 (D.C. Cir. 1985), cannot be construed as a blanket endorsement that an intervenor must always establish standing before intervention

may be granted.[2] Indeed a closer reading of that case demonstrates that it belongs to that class of cases which holds only that an intervenor who pursues claims beyond those originally claimed or seeks to appeal on its own after intervening must independently establish standing.

In *Cook* employees of the Library of Congress sought to intervene as plaintiffs and additional class members in an ongoing class action discrimination suit under Title VII. The government opposed the employees' motion for intervention on the ground that these employees failed to meet the "interests in transaction" standing test because they held a variety of different jobs under different promotion and advancement schemes from those contested by the original plaintiffs. The Court rejected this argument:

> [T]he Library builds an elaborate argument that to intervene of right a party must have standing to challenge or defend the precise actions challenged by the original plaintiffs. This is certainly an interesting interpretation, but the case [*SCLC*] quite plainly says nothing of the kind.
>
> Such a restriction on intervention finds no support in *SCLC v. Kelley*, nor in any other cases of which we are aware, nor, for that matter, in common sense. The whole point of intervention is to allow the participation of persons with interests distinct from those of the original parties.

Id. at 1470-71.

Likewise, the D.C. Circuit opinion in *Southern Christian Leadership Conference v. Kelley*, 747 F.2d 777 (D.C. Cir. 1984) ("*SCLC*"), cannot be construed as approving a blanket requirement that an intervenor must satisfy standing. Instead, that case turns on an unusual set of facts, and, more appropriately, stands only for the proposition that a party who wishes to continue a case on its own must demonstrate that it has standing.

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[2] The quotation in *Cook* that respondents reference ("an intervenor of right, just like an ordinary plaintiff, must have standing . . . ") (Opposition at 15) is *not* the holding in *Cook*, but merely *dicta* characterizing the opinion in *Southern Christian Leadership Conference v. Kelley*, 747 F.2d 777 (D.C. Cir. 1984).

In *SCLC*, Senator Jesse Helms sought to intervene *six years after judgment* in two consolidated cases arising out of the FBI's electronic surveillance of Dr. Martin Luther King, Jr.[3] Senator Helms moved to intervene to *reopen* the matter in order to obtain access to the surveillance tapes. He argued that access to the tapes would better inform him and the rest of the Senate during the Senate's deliberation of a bill to designate Dr. King's birthday as a national holiday. The D.C. Circuit found that Senator Helms lacked any protectable interest and thus lacked standing. Viewed in this context, the decision does not equate with a requirement that an intervenor in an *on-going* case or controversy, such as the present case, must establish standing in order to intervene.

The only apparent support for respondents' position is found in the Seventh Circuit. Yet even that circuit has stated that "[t]he requirements for intervention, moreover, should generally be more liberal than those for standing to bring suit." *United States v. Board of School Commissioners, Indianapolis, Ind.*, 466 F.2d 573, 577 (7th Cir. 1972), *cert. denied*, 410 U.S. 909 (1973); *see United States v. City of Chicago*, 870 F.2d 1256, 1260 (7th Cir. 1989) (white females' confident expectation of being promoted constituted sufficient interest for intervention in a discrimination suit).[4]

Contrary to respondents' contention, allowing CFA intervention in this action would not increase the complexity of the action without any corresponding benefit. Opposition at 17. There is nothing in the record to support respondents'

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[3] In the underlying case, the district court had dismissed as time barred the plaintiffs' claims for damages for the surveillance, but accepted the parties' agreement that the tapes should be sealed for 50 years. 747 F.2d at 228.

[4] *Solien v. Miscellaneous Drivers & Helpers Union, Local No. 610*, 440 F.2d 124 (8th Cir. 1971), cited by respondents for the proposition that an intervenor-applicant must establish standing, must be deemed no longer valid since it was decided one year prior to this Court's decision in *Trbovich*, 404 U.S. 528 (1972), and six years before *Planned Parenthood of Minnesota, Inc. v. Citizens for Community Action*, 558 F.2d 861 (8th Cir. 1977), where the Eighth Circuit resolved the issue of intervention without reference to standing.

assertions that CFA's intervention would in any degree significantly increase the workload of the court or of the existing parties. In any event, the district court retains full discretion under Rule 24(a)(2) to limit CFA's participation in any of these respects if appropriate after intervention is granted.[5] Moreover, CFA has stated multiple specific interests which would justify intervention of right in this action. These interests include economic and noneconomic interests any of which provide an independent basis for intervention of right. Petition at 3.[6]

CONCLUSION

For each of the foregoing reasons and the reasons set forth in its Petition for A Writ of Certiorari, CFA's petition should be granted.

Respectfully submitted,

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[5] "An intervention of right under [Rule 24 (a)] may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings." Fed. R. Civ. P. 24 (Notes of Advisory Committee on Rules, 1966 Amendment).

[6] Respondents' argument that permitting intervention by CFA based upon CFA's interests in the proper interpretation of NEPA would open the flood gates and allow anyone to intervene in every NEPA action is unfounded. *See* Opposition at 17. CFA's interests in the proper interpretation of NEPA are virtually identical to the interests asserted by plaintiffs to establish their standing in this litigation. CFA's economic and noneconomic interests are specific and not generalized as described in detail in the record below. *See* Declaration of William N. Dennison, included in the Excerpts of Record at E-10-18.